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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912. 89

No. [redacted]

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, W. S. DUNCAN & COMPANY, ET AL., - Appellants,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, NASHVILLE GRAIN EXCHANGE, AND NASHVILLE BOARD OF TRADE, - Appellees.

Appeal from the United States Commerce Court.

Brief on Behalf of Louisville & Nashville Railroad Company, Appellee.

HENRY L. STONE,
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Attorneys for Louisville & Nashville Railroad Company.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

ERRATA.

IN BRIEF ON BEHALF OF LOUISVILLE & NASHVILLE RAILROAD CO.

No. 706.

On page 3, fifth line from end of second paragraph "wth" should be "with".

On page 7, eighth line from end "esablishment" should be "establishment".

On page 9, tenth line from top "aforedd" should be "afforded".

On page 38, 9th line from the top "abolised" should be "abolished".

On page 48, at bottom, last three lines should be transposed so as to read:

> "that *from said reports and tariffs* it appears that *said rebilling and reshipping privileges exist at many interior points where no water competition ob-*"

On page 53, in the second line in the quotation from New Orleans Board of Trade case, the word "should" should be replaced by the word "could", so that the quotation will read:

> "Such authority, however beneficently exercised in one case could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

On pages 64 and 65 the quotation from I. C. C. v. Baltimore, etc., R. Co., 43 Fed. 37, as printed, is full of errors and it should read as follows:

> "Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

I. C. C. v. Baltimore, etc., R. Co., 43 Fed. 37.

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IN THE

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OCTOBER TERM, 1912.

No. 706.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, W. S. DUNCAN & COMPANY, ET AL., - - - - - - - *Appellants,*

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, NASHVILLE GRAIN EXCHANGE, AND NASHVILLE BOARD OF TRADE, - - - *Appellees.*

APPEAL FROM THE UNITED STATES COMMERCE COURT.

Brief on Behalf of Louisville and Nashville Railroad Company, Appellee.

This is an appeal from a decree of the Commerce Court annulling and setting aside an order of the Interstate Commerce Commission made on June 9, 1911, requiring the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to cease and desist for a period of two years from and after August 1, 1911, from granting to Nashville, Tennessee, and to dealers in grain, grain products, and hay located at Nashville the privilege of rebilling or reshipping grain, grain products, and hay from Nashville, so long as said railroads should refuse and refrain from granting said privilege of rebilling or reshipping grain, grain products, and hay to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Georgia, or either of them, and to the dealers in said commodities located in said cities.

STATEMENT OF FACTS.

The L. & N. owns and operates a line of railroad from Louisville, on the Ohio River, in Kentucky, to Nashville, Tenn., on the Cumberland River, and from Nashville to Birmingham and Montgomery. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, or Athens, Ga. It has a line of railroad running from Louisville and Cincinnati to Atlanta, but does not reach Atlanta via Nashville.

The N. C. & St. L., owns and operates a line of railroad from Hickman, Kentucky, on the Mississippi River, to Nashville, crossing the Tennessee River at Johnsonville, and from Nashville to Atlanta via Chattanooga. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, or Athens, Ga.

The rebilling or reshipping privilege condemned by the order of the Commission is as follows:

On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi river crossing points such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N. C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destinations in Southeastern and Carolina territory; and on such reshipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi river crossing, via Nashville, to any given destination in said territory, shall exactly correspond wth the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi river crossing points to its final destination without having been stopped in transit at Nashville.

PROCEEDINGS BEFORE THE COMMISSION.

Original Complaint.

On August 25, 1908, W. S. Duncan & Company and other grain dealers of the cities and towns of Atlanta, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, Athens, and Columbus, all located in the State of Georgia, on behalf of themselves and the localities in which they did business, filed with the Interstate Commerce Commission a petition against the Louisville & Nashville Railroad Company, a corporation of the State of Kentucky; the Nashville, Chattanooga & St. Louis Railway, a corporation of the State of Tennessee, and various other railroad corporations named in said complaint.

The complaint in substance charged that through the adjustment of rates, rules, practices, and regulations, undue preference and advantage in the handling of grain, grain products, and hay from Ohio and Mississippi river crossings, and beyond, to Southeastern destinations was granted by the carriers to Nashville, Tenn., and that thereby the carriers unjustly discriminated against the complaining Georgia points and gave to Nashville undue preference and advantage over the complaining points. The alleged practices of the carriers complained of, as stated by the Commission in its first report (Opinion No. 1026, 16 I. C. C. R. 590), were as follows:

(a) The payment by the railway companies of elevation charges at Nashville.

(b) The application of the any-quantity rate on grain and grain products from Ohio and Mississippi river crossings and Nashville and points related thereto, to Southeastern destinations.

(c) What is known as the rebilling or reshipping privilege at Nashville, with its incidents.

The Nashville Grain Exchange and the Nashville Board of Trade intervened in this case before the Commission in support of the retention at Nashville of these privileges.

While the reshipping practice was attacked, an examination of the petition and of the record at the first hearings will demonstrate that the attack was really upon the any-quantity rate, while the reshipping practice at Nashville was obviously regarded by the petitioners as of minor importance only. The petitioners represented the jobbing interests, and the existence of the any-quantity rate and the ultimate establishment of a differential between the carload and less than carload was the real object of their concern. The prayer of the petition was framed, not with the view of having the reshipping privilege at Nashville continued and widely extended to an indefinite number of other localities, but it asked (a) that the defendants be prohibited "from continuing to allow to the city of Nashville and shippers therein the unlawful practice known as the rebilling privilege," and (b) that there be established "a fair and reasonable differential between shipments in carlots and shipments in less than carlots of grain and grain products from Ohio and Mississippi river crossings, Nashville, Tennessee, and points related thereto, to Southeastern destinations" (see complaint, Record, page 1054). Thus, at the outset, the effort of the petitioners before the Commission was to *destroy* the reshipping practice at Nashville and *obtain a differential* between carload and less than carload shipments to the Southeast on grain moving from different points, and whether through Nashville or by other routes.

Answer of Defendant Carriers and Intervening Defendants, the Nashville Grain Exchange and the Nashville Board of Trade.

The defendant carriers and the intervening defendants filed detailed answers in which the material allegations and the merits of the complaint were denied, and it was specifically denied that complainants, or others similarly situated, or the localities in which they did business, were unjustly discriminated against in favor of Nashville, Tenn. In said answers, among other things (and reference is only made to the portions of the answers dealing with reshipping), it was insisted that Nashville was a natural primary grain market, a natural "concentration point" for grain and grain products moving from the producing territory of the North and West via Nashville into Southeastern territory; that the practice of reshipping from Nashville was due to the fact that it was a primary grain market, located on the Cumberland River, having direct water connection with the great Western grain centers; that by reason of its location on the Cumberland River, Nashville could and did compete as a primary grain market with other primary grain markets, such as Cincinnati, O., Louisville, Ky., Evansville, Ind., Cairo, Ill., St. Louis, Mo., Hickman, Paducah and Henderson, Ky., New Albany and Jeffersonville, Ind., and other primary markets and river crossings for the movement of grain into the Southeastern territory; that this reshipping practice had existed at Nashville for over forty years, and that Nashville, with respect to grain shipments into the Southeast, by reason of its location and natural advantages, was entitled to be classed with other primary markets, river crossings and gateways; that Nashville's location on a navigable river and its location with respect to producing and consuming territory had, for years, operated to give it these reshipping or transit privileges, which had been originally accorded to Nashville and continued by the carriers serving Nashville, not *voluntarily*, or with a view to conferring any benefit upon Nashville, but of *necessity* and in order to enable the rail carriers to compete with the boat lines on the Cumberland River for the movement of grain via Nashville into the Southeast; that Atlanta and the other interior jobbing cities in the Southeast named in the complaint were not in any sense natural concentrating points or primary markets for grain and grain products, had no water competition, and were not similarly circumstanced with and situated as Nashville, and it was insisted that there did not exist in any way or to any extent at Atlanta or the other Georgia cities the decisive circumstances and conditions which originally compelled the esablishment and still compel the maintenance of the reshipping practice there and at other primary markets located on the Ohio and Mississippi rivers. It was specifically denied that the reshipping practice at Nashville was in any way unlawful or illegal or an unjust discrimination against Atlanta or the other Georgia cities, or that it should be abolished as asked in the petition. (Record, pp. 971-978.)

Orders of the Commission.

Upon the issues made by the complaint and answers, testimony was taken, but the complainants' testimony seems to have been principally devoted to an attack upon the alleged payment of elevation charges by the carriers at Nashville and the maintenance of the any-quantity rate.

As has been stated, so far as the reshipping practice was concerned, the complainants' evidence was designed to show that reshipping was unlawful in substance and that under it manipulation of rates was possible.

The defendants and interveners, upon their part, introduced very full and complete evidence, not only of traffic officials of wide experience and fully acquainted with the conditions at Nashville and in the Southeast, but also of numerous witnesses having an intimate knowledge running over the entire time during which the reshipping practice had prevailed at Nashville and thoroughly acquainted with the reasons which compelled the original establishment of this practice and its continued maintenance.

After the testimony was concluded on June 24, 1909, the Commission made a report and order in this case, being *Opinion No. 1026, 16 I. C. C. R. 590.* By this report and order the Commission prohibited the carriers from paying further elevator allowances at Nashville, but *refused* to order a differential as to carload and less than carload rates on this traffic to the Southeast, upon the ground that the establishment of such differential would have the effect of enhancing the price of these products to the consumers. (Record, pp. 1058-1069.)

The Commission required the carriers to cease and desist, on or before September 1, 1909, and for a period of at least two years thereafter abstain from granting to dealers in grain, grain products, and hay the privilege of reshipping at Nashville. From its report accompanying this order it is evident that the Commission condemned the reshipping practice because, as the Commission then viewed the matter, it afforedd an illegal device, by means of which, the Commission then thought, grain, grain products, and hay might be transported at less than the lawfully published tariff rate. In other words, the Commission held, at this time, that the reshipping practice, irrespective of any question of undue discrimination, was unlawful *per se*.

With respect to that portion of the above order that related to the reshipping practice at Nashville, the effective date was by successive orders postponed and suspended pending the general investigation ordered and made by the Commission entitled "In the Matter of Substitution of Tonnage at Transit Points." The report of the Commission in this general investigation was rendered May 3, 1910, being Opinion No. 1247 of 18 I. C. C. R., page 280. It will be seen that by its order of June 24, 1909, the Commission had condemned as unlawful, in substance and principle, the allowance of the reshipping practice, and the effect of this decision was to involve, not only the reshipping practice at Nashville, but throughout the country.

As a result of the general investigation the Commission receded from the rule and doctrine it had announced in its first report and finding with respect to the reshipping practice at Nashville in this case and declined to condemn as illegal the principle of reshipping or of transit privileges as extended by the carriers throughout different sections of the country and at different markets and concentrating points.

It, therefore, became necessary for the Commission to modify its order entered on June 24, 1909, in this case, and, of its own motion, on the 3rd day of June, 1910, it entered another order whereby the carriers were required to appear and show cause before the Commission at Washington on the 27th day of September, 1910, why the order originally pronounced, abolishing reshipping practices at Nashville—"should not be changed and modified so that it will require the said carriers, defendants therein, to cease and desist from discriminating, in any respect whatever, between Nashville and Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome and Athens, all located within the State of Georgia, and the shippers, consignees, and dealers, respectively, with respect to transit and reshipping privileges and practices as pertain to grain, grain products, and hay, upon the ground that such *discrimination is undue, unreasonable, and unlawful.*" The only question before the Commission under this order to show cause was the alleged discrimination against Atlanta and the other Georgia points by reason of the reshipping practice at Nashville.

Thereafter the carriers filed with the Commission full and complete answers to the rule to show cause, and the intervening defendants in said case before the Commission likewise filed detailed answers to said rule, wherein also it was denied that the granting of these transit privileges at Nashville amounted to any discrimination against Atlanta and the other named Georgia points, or gave any undue or unlawful preference or advantage to Nashville as against those points. (Record, pages 986-994.)

On September 27 and 28, 1910, hearings were had upon the issue thus made, and the carriers and interveners appeared in Washington and introduced and examined numerous witnesses, though the petitioners before the Commission introduced no witnesses. The proof introduced at these hearings by the carriers and interveners was, in accordance with the order of the Commission and the direction of the Commissioner conducting said hearing and examination, *limited to the single issue of discrimination;* was full, detailed, and clear with reference to the existence of circumstances and conditions prevailing at Nashville, its location, and natural advantages, which entirely differentiated Nashville from the complaining Georgia points with respect to such traffic, and showed clearly that there were not similar circumstances or conditions existing at or surrounding the complaining points, and that there was no undue or unlawful discrimination against the complaining points and no advantage or preference, which the law condemns as undue or unlawful, given Nashville by these reshipping privileges.

This proof was not contradicted in any way. On June 9, 1911, the Commission made a supplemental report and order, purporting to give a previous history of the controversy, whereby the Commission recites that the reshipping practice with respect to grain, grain products, and hay at Nashville gave to it undue and unreasonable preference and advantage over the complaining points in violation of Section 3 of the Act, and ordered the carriers at Nashville "to cease and desist on or before the 1st day of August, 1911, and for a period of at least two years thereafter abstain from granting to Nashville and to the dealers in grain, grain products, and hay located at Nashville the privilege of so rebilling or reshipping said products from Nashville so long as said defendants refuse and refrain from granting the said privilege of rebilling or reshipping grain, grain products, and hay to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, or either of them, and to the dealers in said commodities located at said cities."

The effect of this order was to require the carriers serving Nashville either to abolish the reshipping practice at Nashville or to establish the same practice at the other named points, most of which are not reached or served by the carriers serving Nashville.

PROCEEDINGS IN COMMERCE COURT.

The interveners before the Commission, the Nashville Grain Exchange and the Nashville Board of Trade, presented their petition to the Commerce Court, and the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway likewise presented their petition, praying for an injunction to said order of the Commission and that the same might be set aside and annulled.

The Interstate Commerce Commission intervened in both cases, and so also did W. S. Duncan & Company, *et al.* At the October session, 1911, the two cases were heard together and a preliminary injunction was awarded restraining and suspending the order of the Commission complained of until the further order of the court.

Answers to the petition having been duly filed and issue joined, the testimony of numerous witnesses, who had previously testified before the Commission, was taken at Washington on November 27, 28 and 29, 1911, documentary evidence was introduced, and a complete transcript of testimony, exhibits, and all evidence before the Commission was introduced in evidence. The transcript of evidence before the Commission was certified by its Chairman to contain all the evidence *taken before it.* (Record, p. 523.)

As will be hereafter shown, the answer of the Interstate Commerce Commission, in addition to putting in issue the material allegations of the petition, affirmatively set forth that the Commission, in the exercise of power claimed to be possessed by it under the law, had in forming its opinion and arriving at its conclusion considered "all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge'' of respondent in the performance of its duties and functions prescribed and set forth in the act to regulate commerce and the amendments thereto pertaining to the privileges of rebilling and reshipping, and that ''from said reports and tariffs it appears that said rebilling and reshipping privileges exist at many interior points where no water competition obtains,'' and that it was therefore not competent or relevant for petitioners to allege ''that any particular fact or facts before'' the Commission in said proceeding are uncontradicted or conclusive in favor of petitioners' contention; and that petitioners could not by judicial proceeding ''ascertain each and all the facts, circumstances and conditions in regard to said transportation that were necessarily and properly *considered by* and *which aided*'' the Commission ''*in arriving at its conclusions* that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory.'' (Record, page 115.)

In its answer the Government stated that in its report the Commission ''*found as a fact on all the information coming to its knowledge*'' that, by means of the reshipping privilege, Nashville was given undue and unreasonable preference and advantage and the Georgia points were subjected to undue and unreasonable prejudice and disadvantage (Record, p. 109), and the Government further averred that the discrimination in favor of Nashville fully appears by the published tariffs filed with the Commission which were ''duly considered by the Interstate Commerce Commission in forming its opinion and reaching its conclusion, etc."

Subsequently, the Commerce Court held the order to be illegal and invalid and decreed the annullment thereof. In its written opinion (Record, p. 1101) the court, after carefully reviewing the facts, concluded that the indisputed facts demonstrated that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River and on that account alone, that it was done by the railroads to obtain the shipment of grain from Mississippi and Ohio river crossings over their own lines, that the competition on the Cumberland River is now the same potentially as it was when the privilege was first extended, and that there was consequently no violation of Section III. (197 Fed. 58.)

We come now to a consideration of the evidence before the Commission certified by its Chairman to have been all the evidence taken before it.

We would first call attention to the fact that the entire record before the Commission may be searched in vain for any substantial evidence showing that the reshipping practice at Nashville gives to Nashville or to shippers there any *undue* or *unlawful* preference or advantage over Atlanta or the other complaining points. Notwithstanding the undisputed and uncontradicted evidence and facts, the Commission has reached a conclusion unsupported by any evidence before it, and it has entered an order beyond its powers, and has condemned the reshipping practice as a violation of the Third Section of the Act, when under the facts proven by the uncontradicted evidence there is, as a matter of law, no undue or unlawful preference given Nashville or any prejudice or disadvantage against the complaining points, which, under Section 3 of the Act, as construed by this court can be condemned as *undue* or *unlawful.*

The *reasonableness* of the rates from Nashville or the river crossings was never put in issue, questioned, or attacked *in any way* or *at any stage* of the proceedings. The sole issue made and presented before the Commission was one of undue discrimination and the order and report were based solely on the Third Section of the Act.

It must be remembered that the order of the Commission is not based upon the proposition that the scope of the reshipping privilege is too large and disproportionate to the influence of the competition afforded by the Cumberland River. The order of the Commission, which declares the privilege to constitute a violation of Section III, requires the carriers to withdraw it from Nashville, unless they also extend the whole of the privilege to the Georgia points.

Obviously the order is thus predicated upon the conclusion that the competition of the Cumberland River constitutes no element whatever in producing the practice at Nashville, and that the conditions existing at the Georgia points are in all respects similar to and in no respect dissimilar from the conditions existing at Nashville.

ABSTRACT OF TESTIMONY.

The evidence before the Commission will show that by *uncontradicted* evidence there were established the facts as follows:

Nashville, by reason of its location on a navigable river connecting it with, and of its close proximity to, the grain producing section of the West, was the first primary market or concentrating center for grain from the West moving into the Southeast; that it is a natural gateway, and, by reason of its natural advantages and geographical location, is entitled to be classed as a primary grain market or point of concentration with the other Ohio and Mississippi river crossings and gateways with which it competes; that it is much nearer the grain producing section north of the Ohio and west of the Mississippi rivers than is Atlanta or any of the other complaining points, and by reason of its location and natural advantages it is an ideal point for the concentration, treatment and reshipping of grain, grain products, and hay. That its location upon a navigable river and its direct connection by means of water transportation with the Ohio and Mississippi river crossings and with the grain producing section north of the Ohio and west of the Mississippi, differentiates it from the Georgia points; that neither Atlanta nor any of the other complaining points in Southeastern territory is similarly situated; that they have no water transportation connecting them with the grain producing section, and that Nashville should be classed as a primary grain market with the

Ohio and Mississippi river crossings rather than with Atlanta or any other point in the Southeast.

It was established further by the uncontradicted evidence before the Commission and can not be disputed that the reshipping practice at Nashville was not *voluntarily* given by the carriers serving that point, but was forced upon the rail carriers by the *controlling* and *compelling force* of water competition on the Cumberland River, which has compelled the continuance of this practice at Nashville as a measure of self-protection upon the part of the rail carriers in order to secure for themselves a fair share of the traffic and protect their revenues in competition with the boat lines.

It was shown that, for a representative period of time, the shipments of grain, grain products, and hay from Nashville to local stations in the State of Georgia, located on 34 railroads, aggregated only 839,722 pounds, while the complaining Georgia points shipped to the same stations during the same period of time an aggregate of 6,116,779 pounds. During this period (August, 1908), Atlanta shipped three times as much of said products to these points as did Nashville; Columbus shipped substantially more than Nashville; Macon shipped nearly three times as much as Nashville. Even small Athens shipped more than did Nashville. Altogether, Nashville shipped 12.07 per cent and the complaining Georgia points 87.93 per cent to local stations in the State of Georgia. (Record, pages 932, 933.)

Thus, whatever effect the rebilling practice at Nashville produces, its potency appears to result in very little advantage to Nashville and very little disadvantage to the complaining Georgia points.

It was further shown by the evidence before the Commission, and there was no substantial evidence to the contrary, that some of the consequences of discontinuing the rebilling practice at Nashville would be:

(1) If the rail carriers serving Nashville *maintained* the local rate in and out and the Nashville dealers did not place themselves in a position to use the river transportation, the traffic in question would be deflected to the other primary markets and rail gateways at the river crossings with which Nashville now competes, without changing the present relative adjustment; that if the Nashville market were wiped out, the Ohio and Mississippi river crossings and rail gateways between the grain producing West and the grain consuming Southeast could do the business, and all of the business, that is now done through Nashville at exactly the same cost to consumers in the Southeast, and that any point in Southeastern territory that can now draw grain from Nashville on the basis of the through rate from the Ohio River could still continue to draw grain from all or any of the river crossings on exactly the same through rates as from Nashville.

The effect, therefore, if Nashville were eliminated from the situation, would be needlessly to sacrifice the revenues of the rail carriers serving Nashville, to deprive them of handling this traffic, to destroy and practically confiscate the property, plants, and investments of the Nashville grain dealers, without any corresponding benefit to Atlanta or to the other complaining points. There would be one less primary market, but the consuming points in the Southeast would still draw grain from the Ohio and Mississippi river crossings on exactly the same rates and as readily as from Nashville under the present rehipping practice.

(2) If the reshipping practice at Nashville were abolished and the rail carriers serving Nashville should *reduce* the local into Nashville to 7 cents, neither Atlanta nor any of the other complaining points would be benefited so far as any points in Georgia or in by far the larger part of the Southeast territory (other than the coast points) is concerned. Nashville then could ship in on the local rate and ship out to Southeastern territory whenever the dealer at Nashville saw proper to do so, without any restriction as to the time for reshipping. If the rail rate into Nashville should be forced down to six cents in competition with the boat lines on the Cumberland River, Nashville, by using the 6-cent local in and the present local out, could then, without any reshipping practice, reach practically every point in the Southeast, *including* the coast points, just as she does to-day under the reshipping practice, while neither Atlanta nor any of the other complaining points would be benefited in any way so far as the alleged discrimination is concerned. This would not only involve the reduction of the local rate into Nashville from 10 to 6 cents on grain and grain products, but it would also involve the entire rate adjustment to Nashville and to all points basing thereon, and would needlessly sacrifice the revenue of the carriers

without any corresponding benefit to Atlanta or any of the other complaining points.

(3) If the rail carriers serving Nashville retired from the traffic rather than cut the local rate into Nashville by meeting the river rate, this would involve an enormous loss of tonnage and sacrifice of revenue upon their part. The witnesses on behalf of the interveners and practical men who had been engaged in river transportation for years testified that the boat lines on the Cumberland River could and would handle traffic to Nashville at a rate of six cents per hundred pounds, or even less. It was shown by the testimony of these witnesses that if the rail rate of ten cents were maintained, the boat lines, by installing modern equipment and additional facilities for handling grain from boats to the cars at Nashville, could bring the traffic into Nashville at from three to four cents per hundred pounds. Even at a river rate of six cents Nashville could draw to itself, by means of boat lines on the Cumberland, the traffic now handled by the rail lines, it would still be a primary market for the handling and concentration of grain, and could still ship to the Southeast and reach practically all points in the Southeast, just as at present under the reshipping practice, and could compete with Atlanta and all of the other complaining points on just as favorable terms as to-day, and the alleged discrimination would not be removed nor would Atlanta or any of the other complaining points be benefited in any way. This, as has been stated, would involve, however, the sacrifice of an enormous amount of revenue upon the part of the Nashville, Chattanooga & St. Louis

and the Louisville & Nashville railroads, would either exclude them from handling any of the traffic north or west of Nashville, or compel them to sacrifice thousands of dollars of revenue in an effort to meet the boat rates, and would involve the rates to Nashville and points basing thereon not only upon hay, grain, and grain products, but also upon other traffic and commodities. If the rail lines did not meet the river rate, this would necessitate the grain dealers sacrificing their plants and investments now on the rail lines at Nashville and the establishment of new facilities for handling grain on the river basis.

Of course, any reduction in the through rates on grain and grain products from the West or Northwest via Nashville to the Southeast would be followed by a corresponding reduction of the through rates through all the river crossings and rail gateways, as the rail lines serving other river crossings would not permit the traffic to be drawn exclusively through the Nashville gateway.

There has never been any attack at any stage of this case upon the reasonableness of the through rates on this traffic from the river crossings to the Southeast nor upon the reasonableness of the rates from Nashville to the Southeast. The sole ground upon which the Commission ordered the reshipping practice either discontinued at Nashville or extended to the Georgia points was the alleged violation of Section 3 of the Act, and *this is the sole ground upon which the order is made to rest*, as appears from the report and the order itself.

The uncontradicted evidence shows that the elimination of the reshipping practice would not remove the alleged discrimination which the Commission has undertaken to condemn, and would not benefit in any way any of the complaining points so far as this alleged discrimination is concerned. The reshipping practice *simply serves to enable the carriers to meet water competition on the Cumberland River, to protect their revenues in competition with the boat lines connecting Nashville with the river crossings and gateways.*

(4) That the reshipping practice does nothing more than meet by rail competition the rates of the boat lines and that it gives Nashville no undue preference or advantage or anything which she did not possess before it was established by the rail lines and nothing more than her natural advantages and location enabled her to demand and compel. It is simply a means adopted by the rail carriers serving Nashville to enable them to compete with the river lines as to the through traffic and to secure a fair share thereof, without needlessly sacrificing their revenues.

(5) It is totally impracticable to extend the reshipping practice to Atlanta or any of the other complaining points. The evidence shows that the connecting rail lines whose co-operation is necessary to afford this practice to Atlanta and the other complaining points have declined to extend this practice and will adhere to their decision. The evidence also shows, as will hereinafter be pointed out, that to attempt to extend this practice to Atlanta and the other points in the Southeast, even if the carriers serving those points were willing to do so, would result in the utmost confusion, would not be of benefit to any of the

points other than Atlanta, and, further, that to take out the reshipping practice at Nashville would have the effect only *of diverting this traffic and throwing this business* into the hands of the dealers at the Ohio river crossings.

The enforcement of the order of the Commission would result in a large sacrifice of the revenues of the carriers, the denial of their right to meet and protect themselves in the most effective way against water competitors, and yet fail to remove the alleged discrimination.

ORIGIN AND HISTORY OF THE RESHIPPING PRACTICE AT NASHVILLE.

Not Established Voluntarily by the Rail Carriers, but Compelled by the Force of Water Competition.

The fact that originally the reshipping practice was not *voluntarily* given to Nashville by the carriers and that Nashville was a primary grain market by reason of its location on the Cumberland River and its connection by water transportation with the grain producing section before there was any rail line north or west of Nashville connecting it by rail with the Ohio and Mississippi rivers can not be disputed in the face of the evidence before the Commission. The evidence showed that the reshipping practice was forced upon the carriers as a measure of self-protection and grew out of an effort upon the part of the Nashville, Chattanooga & St. Louis Railway, after the line west of Nashville was constructed and acquired by that road, to secure for its western connection a share of the traffic from the West into Nashville in competition with the boat lines on the Cumberland River, and to minimize its loss in competition with the boat lines.

The establishment of this reshipping practice at Nashville is intimately connected with the history of the Nashville, Chattanooga & St. Louis Railway which is very fully covered by the evidence of Mr. H. F. Smith, then Traffic Manager, and Mr. Charles Barham, General Freight Agent of the Nashville, Chattanooga & St. Louis Railway.

History of the Nashville, Chattanooga & St. Louis Railway.

The construction of the Nashville & Chattanooga road started in 1845, and was completed in 1854. It was built from Nashville to Chattanooga with no rail connection west of Nashville. This original line extending from Nashville to Chattanooga depended entirely upon the traffic received locally and from the boat lines on the Cumberland River reaching Nashville. It was the first line projected from the direction of the Southeastern territory to the West and it was constructed to strike the Cumberland at Nashville. (Barham testimony, Record, page 780.)

This was prior to the completion of the St. Louis and Southeastern Railroad from Evansville, or of the Louisville & Nashville road from Louisville, or of the building of the line from Cincinnati south to Louisville, and before the construction of the Memphis & Charleston or of any rail line from any Ohio or Mississippi river point to the Southeast. In fact, there were no rail lines then connecting the Southeastern territory with Nashville or any of the other river crossings. Chattanooga was as far West as the rail lines from the Atlantic coast had then penetrated. The link between Nashville and Chattanooga, formed by the completion of the Nashville & Chattanooga Railway in 1854, gave the Southeast its first rail connection with the grain producing West and afforded a direct route and the *first* rail and water route from the grain producing section along the Wabash, Ohio, and Mississippi rivers, the route being via the Cumberland River to Nashville, thence via the Nashville & Chattanooga Railway to Chattanooga, Atlanta, and other points Southeast.

This road was projected and constructed for the purpose of bringing the consuming territory of the Southeast into direct connection with the producing territory of the North and West. Prior to the construction of the road, *water transportation* had brought the traffic to *Nashville*, which was *the point nearest to the Southeastern territory located on a navigable stream.* The nearest rail line from the Southeast reached Chattanooga only, and when the Nashville & Chattanooga was completed the first direct route was formed. Then Nashville could draw the grain to itself by means of the boat lines from the great river valleys of the Ohio, Wabash, and Mississippi, store it there, and, by means of this direct line to the Southeast, distribute it through all that territory. The construction of this line was but the recognition of the natural advantages and location of Nashville on the Cumberland River as a primary market for the concentration and handling of grain.

Extension of Nashville & Chattanooga Railroad West of Nashville to Hickman on the Mississippi River.

By the completion of the Nashville & Chattanooga Railway in 1854 Nashville became the first original Western gateway through which grain and other Western products, produced in the Northern and Western States, moved into the interior Southeast; such traffic being carried down the Ohio and Mississippi rivers, up the Cumberland River to Nashville, and thence transported by rail. Up to about 1860 there was no rail line west of Nashville connecting it with the Mississippi River.

The Louisville & Nashville Railroad between Louisville and Nashville, completed in 1859, connected Nashville with the Ohio River. What was known as the Nashville & Northwestern Railroad, extending from Nashville to Hickman, Ky., on the Mississippi River, had been projected but was not constructed or completed until during the Civil War, when the United State Government completed it for strategic purposes. The advantages of this road from the West into Nashville, as a connecting link with the Nashville & Chattanooga, were seen and appreciated by the latter, and between 1867 and 1869 the last named road acquired a controlling interest in the Nashville & Northwestern extending west of Nashville to Hickman. In 1872 the Nashville & Northwestern Road was brought into the Nashville, Chattanooga & St. Louis system. Then it was that the Nashville, Chattanooga & St. Louis possessed for the first time a direct line from the Mississippi River to Nashville and from Nashville through Chattanooga to the Southeast, and the problem then presented itself of securing the traffic for the *all rail line* from the Mississippi River to the Southeast in competition with the water transportation afforded by the Cumberland River to Nashville. Up to that time this traffic had been moving to Nashville by the boat lines on the Cumberland River. We quote from the testimony of Mr. Barham:

> "With the acquirement of that interest by the Chattanooga Road in the Northwestern the situation changed to the extent that while up to that time it was a matter of complete indifference to the Chattanooga Road as to how the grain or anything else got to Nashville, whether by boat, rail or wagon, they immediately had the direct and vital interest of bringing of the grain through Nashville by a complete haul from the Ohio River, or the point of production, as far south as we ran, which was Chattanooga at that time, although even then the General Freight Agent of the Nashville, Chattanooga & St. Louis Road, Mr. Anderson, was general freight agent of the Western & Atlantic Railroad. Therefore, as far back as the early seventies, we had a direct interest running all the way from the Mississippi River to Atlanta.
>
> "When we acquired the interest in the Nashville & Northwestern Road we were confronted with the problem of controlling competition with the boats

for a reasonable part of the grain and other western produce which had origin in the western territory. That could be accomplished in either of two ways. We could reduce the rates into Nashville from the river to the level of the then boat rates, or we could devise some plan by which we could protect a through rate, all-rail from the Ohio River to the consuming territory, which would not exceed the combination of water rates plus the rail rates. Naturally we could not charge more than that combination with any hope of controlling and reasonable part of the business. We did not want to make the Nashville proper rate the then existing rate, because it would sacrifice a certain revenue on whatever part of the Nashville local business we might haul in, and it would also affect all that territory basing on Nashville.

"We did not expect to eliminate the boat competition entirely. We did not expect to get all of the business which went into Nashville. We expected the boats would control some, but it was the thought that if we could, practically speaking, control the larger traffic, we could share the local business on the somewhat higher rate with the boats; that we could do a reasonable part of that business.

"We therefore devised and have continued the so-called Nashville reshipping. It was as we saw it then, and as we see it now, really not a change. The grain was moving, and moving at that rate, and it merely continued to move at that rate." (Record, page 781.)

The Establishment and Continuance of the Reshipping Practice at Nashville Was not Voluntary, but was and is Compelled by Water Competition at that Point.

Reshipping was not *voluntarily* given to Nashville by the Nashville, Chattanooga & St. Louis Railway, but was *compelled* and *forced* upon that line in an effort to meet the boat rate into Nashville and to secure the traffic for the all-rail line via Nashville to the Southeast. It was further established that not only was this condition originally forced upon the carriers, but its continuation has been compelled by the same potent and ever-present competitive influence growing out of the location of Nashville upon a navigable water route connecting it with the grain fields.

This was testified to by many witnesses. (Record, pp. 589, *et seq.*, 626, *et seq.*, 789, *et seq.*, 649, *et seq.*, 665, *et seq.*, 696, *et seq.*), and the Commission in dealing with this subject recognizes that this practice was put in and has been maintained by the rail carriers to meet this river competition, and calls attention to the fact that the rail lines have thus met and do continue to meet and deal with this competition on the through traffic via Nashville and not on the local traffic to that point. (Record, pp. 131, 132.)

Thus Mr. Barham:

> "I can see that I have failed in some particular to make myself plain. What I have said, or tried to say, is that reshipping *exists at Nashville today not*

> *through choice, on the part of the Nashville railroads, but through dire necessity, a set of circumstances utterly beyond our control, and which we can not change, however much we might want to make the change.* * * * I can not think it ought to be extended to other places *not possessing those compelling circumstances.*" (Record, p. 792.)

And, once more, the same witness:

> "Now I hark right back to Nashville again. We stop it at Nashville *because we can not help it and not because we want to.* Therefore we do not stop it at other points, because we do not have to, and we do not want to either. We do not want to anywhere. In other words, we would prefer to earn 26 cents by carrying a carload of grain direct from the Ohio River to Macon rather than having to stop that car and handle it, putting it in another car, with the incidental switching and all other incidental expenses of picking it up at Nashville. We would much prefer to carry it to Macon direct." (Record, p. 795.)

And so, likewise, the L. & N. was, from its beginning in 1859, compelled to compete with the Cumberland River, in consequence of which the rates from Louisville to Nashville were promptly made lower than to intermediate local stations, and soon after the reshipping practice was established at Nashville by the N. C. & St. L., it was similarly adopted by the L. & N., and official record of such action is at hand as early as 1877 (Compton, Record, p. 810.)

The fundamental principle, according to Mr. C. B. Compton, underlying the reshipping practice at Nashville was and is water competition afforded by the Cumberland River, the proximity of Nashville to the grain fields, its natural advantages and location, and the fact that grain was and is still brought to Nashville from the entire West and Northwest by boat lines, and if the reshipping practice were abolished, and the rail rate maintained, all of the traffic would be handled by the boat lines.

He continues thus:

> "The reshipping arrangements on grain at Nashville were not arbitrarily established by the Louisville & Nashville Railroad, nor in my opinion by the Nashville, Chattanooga & St. Louis Railway; that is using the word 'arbitrary' in the sense of without reason or justification. *This is forced by competition. There is no favoritism in it. These arrangements were not made to favor Nashville as against any other point. There is no undue preference according to my belief. I do not believe that reshipping would ever have been inaugurated at Nashville, except that the conditions surrounding Nashville, in a geographical sense, forced it upon the railroads.*"

Again, Mr. Compton says:

> "I stated a while ago that the reshipping arrangements at Nashville were not arbitrarily established; *it was necessary to establish them.* The reshipping arrangements were *an economic necessity,* because they constitute the best method available for controlling for the railroads leading from St. Louis and Louisville and other western points to Nashville, the movement of grain from the West to the Southeast, via Nashville, as against the boats in the Cumberland River; *and of conserving revenues* of the railroads on so much of the grain as was brought by

them from the West to Nashville and consumed locally." (Record, p. 812.)

Mr. L. Green, Freight Traffic Manager of the Southern Railway, a system that at the Ohio river crossings is in strong competition with the Nashville lines, testifies on this point as follows:

> "*In my opinion nature gave Nashville the reshipping privilege.* It was the first of the western gateways, and prior to the construction of the Louisville & Nashville road between Louisville and Nashville, the grain traffic from the West sought entry to the South through the gateway of Nashville. The trans-shipment of grain and grain products at Nashville came about in that way. *It does not in my opinion operate to the disadvantage of Atlanta or any other part of the Southeast.* On the contrary, it is a distinct advantage to the Southeastern territory, in that it does give them a market of supply which they would not otherwise have, or if they did have it, they would have it to a very limited degree, limited only by the ability of Nashville to rehandle the grain originating locally, and sending that grain into the South. Therefore, in so far as Nashville can handle a larger area of grain and deliver it in the Southeast in competition with other markets of supply, it is an advantage to the Southeast." (P. 650.)

Mr. H. F. Smith, Traffic Manager of the Nashville, Chattanooga & St. Louis Railway, testified that in 1854, when the Nashville, Chattanooga & St. Louis Railroad was completed, steamboats from New Orleans, from St. Louis, from Pittsburgh, Cincinnati, and Louisville, and perhaps from all of the western navigable streams, were to be seen in Nashville. As many as 27 steamboats at one time could then be seen at the landings there and it was a river point of very considerable importance. Of course, the early conditions have been modified by the construction of railroads and of bridges across the Ohio River, making the through movement by rail practicable. The Cumberland River is, however, *a sufficient factor to this date not only to establish and compel the basis of rates which have long prevailed, but also to compel the maintenance of the reshipping privilege at Nashville.*

It was sufficiently powerful as a competitor to force the rail carriers to install this reshipping at Nashville in order to obtain a fair share of the traffic, it having been originally adopted for the sole purpose of enabling the lines between the Ohio River and Nashville to meet the competition of the Cumberland River. *It has not eliminated that competition, but it has enabled the rail carriers to obtain a liberal share of the grain traffic.*

The water competition on the Cumberland River in connection with the Ohio and Mississippi rivers was and is a controlling and important factor and was sufficient to establish the basis of rail rates which has prevailed and does prevail at Nashville and was sufficiently powerful as a competitor to the rail carriers to force the system of reshipping established at Nashville at an early date. (Record, p. 628.)

T. M. Gallagher stated that he had been in the steamboat business since 1869 and that he had operated boats between Cincinnati and Cairo, Ill., on the Ohio, on the Cumberland River from its source to its mouth, and on the Mississippi River from Cape Girardeau to New

Madrid, Mo.; that he was traffic manager of what was known as the Ryman Line for 19 years. During the time he was engaged in the river transportation business he regularly transported grain from Evansville, Cairo, Paducah, and other points on the Mississippi and Ohio rivers and on the Wabash River to Nashville, Tenn. That the water rate has varied from 5 cents per bag of 145 pounds, or $3\frac{1}{2}$ cents, to 9 cents per hundred pounds; that during the calendar year 1908 there were 33 steamboats plying on the Cumberland River below Nashville. Grain can be handled from the Ohio river crossings to Nashville at 6 cents per hundred pounds; and that if the river men were assured that the local rate of 10 cents per hundred pounds from the Ohio river crossings to Nashville, or even a rate of 8 or 9 cents, would be permanently maintained by the rail carriers from Ohio river crossings into Nashville, the river lines could and would equip themselves to handle all of the grain that is brought into Nashville and now reshipped to the Southeast, *and that they could handle this grain at rates not exceeding 6 cents per hundred pounds; that from his knowledge of the Cumberland River all of the grain now handled through Nashville could easily be transported by the river to Nashville.* Even with the present rate adjustment there is a considerable movement of grain to Nashville by the Cumberland River and during the heavy grain season many towboats and barges are brought into requisition to handle the grain from the Ohio River and Wabash Valley. (Pp. 771-773.)

Water Competition at Nashville is Still Potential and Compels the Continuance of this Reshipping Practice.

This was shown before the Commission by the evidence of Mr. Smith, Mr. Green, Mr. Compton and Mr. Barham, and by practically every one of the witnesses of the interveners who testified concerning the river competition.

Major Stahlman showed that the force of the river competition was more potent at the time of his testimony than when the practice was originally established, and that water competition at Nashville today compels the continued maintenance of the reshipping practice just as it did when the practice was originally installed.

Navigation on the Cumberland River has been greatly improved by Government aid and appropriation, and the river is now navigable for at least nine months in the year for a period which corresponds with the period during which grain moves. It is expected that the navigable season will soon be continuous throughout the year, and boat lines now plying on the river can easily bring all the grain that moves to Nashville and would do so if the reshipping practice were abolished and the rail rate maintained, handling the traffic at 6 cents or less per 100 pounds.

Nashville, by reason of its Location and Natural Advantages is Essentially a River Crossing.

Nashville, by reason of its location and natural advantages, should be classed with the Ohio and Mississippi river crossings rather than with Atlanta and the other complaining points in the Southeast. It is situated 289 miles northwest of Atlanta on the Cumberland River, an *arm of the great western waterways*. It is very much nearer the western grain producing section than any of the complaining points; it was the first concentrating point for this grain moving into the Southeast, and it has always necessarily been classed with the other river crossings and rail gateways through which rates to the Southeastern common and basing points are made. Nashville, with respect to rail and river competition, is exactly in the same class with these Mississippi and Ohio river crossings. Boat lines can and do reach from all of these river crossings to Nashville, bring the grain to these crossings or to Nashville, and Nashville can reship on the river rate in and the rail rate out. It was a great concentration market for grain and had this reshipping privilege in 1854 before Cincinnati, Louisville, Paducah, Evansville, Henderson, Cairo, or any of the other Mississippi or Ohio river crossings were grain markets or had the reshipping privilege extended to them. When the bridges, rail lines and connections south were constructed at and from these crossings, and rail gateways, they simply became, what Nashville was and had been long before, concentration points for grain, and as such they now all have this reshipping privilege in one form or another.

Rates from Nashville to Birmingham, Montgomery, and Selma, to Chattanooga, Atlanta, and Macon, and to the Carolinas, Georgia, and Florida, are made, *not* with relation to the rates from Birmingham, from Chattanooga, or from Atlanta to the other points, *but with relation to the rates from the river crossings.*

If the reshipping practice at Nashville were abolised, the complaining points *would not be benefited, but the traffic would be diverted* to the *other* river crossings. (Record, pp. 277, *et seq.*)

> "*You see Nashville had this business before there was a railroad built into Nashville*, except the Nashville & Chattanooga Road; but what these people are doing in the making of these reshipping arrangements is simply to enable Nashville *to hold the business that she had before* and have that business come in and out over the lines that they have built north and west of Nashville. That is all. *Nashville has not been given anything more than she had before, before there was a single railroad built north and west of Nashville. She had not as much. She is just now one of the several gateways.*" (Stahlman, Record, p. 714.)

THERE IS RESHIPPING AT ALL THE RIVER CROSSINGS.

If the reshipping practice at Nashville were abolished it would still remain in effect at the other river crossings, with which Nashville now competes, and the reshipping arrangements at Nashville do not give to

Nashville anything to which she is not entitled or which she could not compel or command by reason of her natural advantages and water transportation. The Ohio river crossings are accorded this reshipping and at Nashville it is compelled by reason of the river transportation. No *artificial* situation is created there by the reshipping arrangement, because she is so situated as to be able to compete *naturally* by the use of the river transportation with the rail lines serving the Ohio and Mississippi river crossings.

If Reshipping Practice at Nashville were Abolished Neither Atlanta Nor Any Other Complaining Point in the Southeast Would be Benefited.

(a) If the reshipping practice at Nashville were abolished altogether and the present rates in and out of Nashville maintained and the grain dealers there did not meet the situation, but retired from the business, and the Nashville market were wiped out, still the Ohio and Mississippi river crossings and rail gateways between the grain producing West and the grain consuming Southeast could do the business and all the business that is now done through Nashville at exactly the same cost to consumers in Southeastern territory. It is true that all through rates from the Ohio river crossings into the Southeast consuming territory are uniform and protected and applied at Nashville, but if Nashville were eliminated the complaining points *would not be benefited.*

For any point in Southeastern territory that can now draw grain from Nashville on the basis of the through rate from the Ohio River, which is less than the combination on any of the complaining Georgia points, could still continue to draw grain from any or all of the Mississippi and Ohio river crossings exactly as it does now from Nashville and *at the same through rates.*

(b) On the other hand, if the rail lines serving Nashville should reduce the rate into Nashville, in competition with the boat lines to 7 cents, or even if the rail rate of 10 cents were maintained and the grain dealers at Nashville were to establish new facilities on the river to handle the grain on the river basis, and if all of the grain now moving via Nashville by rail were brought there by boat lines on the Cumberland for 7 cents per one hundred pounds or less, Nashville could then reship to all Georgia points, and to practically all points in the Southeast (other than the coast basing points) which she can now reach, on at least as favorable rates as at present by using *the water rate in and the rail rate out,* without any reshipping privilege whatever, and could compete with the other primary markets to the Southeast just as she does today and on as good a basis of rates. The complaining points would be in no way benefited, the alleged discrimination would not be removed, and the effect of enforcing the Commission's order by abolishing the reshipping practice would be simply the loss of an immense amount of revenue by the carriers, needlessly sacrificed, which would compel them either to retire from the traffic or to meet the river rate and cut the rail rate into Nashville proper from 10 cents to 6 or 7 cents, or even less, as the case may be.

The striking down of the reshipping practice would not remove the alleged discrimination or benefit the complaining points, but it would needlessly sacrifice the revenues of the carriers and practically confiscate and destroy the large investments, plants, and facilities of the Nashville grain dealers now located on the rail lines.

The contention as to the alleged discrimination in favor of Nashville seems to be that Nashville can reach Griffin, Newnan, and other common points on the same through rates which apply from the Ohio and Mississippi river crossings, but that Atlanta could not.

The reason of this is that these points do not base on Atlanta, but some have through rates from Ohio river crossings a differential higher than Atlanta, while others, through competition, have rates so depressed that they have themselves become basing points, so that any Ohio river crossing has the same through rates to these common or base points, which is less than the Atlanta combination. The fact that Nashville can reach these points on a parity with the Ohio river crossings is due to its location and *natural* advantages in being 289 miles north of Atlanta on a navigable river connecting it by direct water transportation with the grain producing section, clearly differentiates it from Atlanta and the other complaining points, and classes it as a primary market entitled to compete with the other river crossings.

The alleged disadvantages under which it is claimed Atlanta merchants labor in selling grain in Griffin and Newnan are not in any way related to or caused by the reshipping arrangements at Nashville.

They are due to the fact that the combination on Atlanta is higher than the through rate from the Ohio river crossings to any such common or basing point, and that would continue to be true even if Nashville rebilling were abolished.

And it is wholly immaterial whether the grain is reshipped from Nashville at the Nashville proper rate or on the basis of the through rates from the Ohio River, for the relation of Atlanta to Griffin or Newnan would remain the same, since the rate from Nashville would continue to exceed the rate to Atlanta by 5 cents only and this sum is less than the local rate from Atlanta to Griffin or Newnan. (Compton, Record, p. 819.)

And if the reshipping practice were abolished and the rail lines via Nashville should meet the river rate or the grain dealers at Nashville go to the river basis and avail themselves of the river transportation, Nashville could without any reshipping practice, maintain its present position in the Southeastern trade by using the water rate in and the rail rate out by the combination all-rail rate on exactly the same basis and with at least as low total rates as at present. There would result no benefit to Atlanta or any of the other complaining points, but there would result a heavy loss to the rail lines serving Nashville and a sacrifice of their revenues to the extent that they cut the Nashville rate to meet the boat line competition or surrender the traffic to the boat lines.

The withdrawal of the reshipping arrangement at Nashville could not increase the movement of grain from the West to the Southeast, nor would it decrease it, but it would simply divert the grain now moving into the Southeast via Nashville to other channels and result in increasing *not the total movement* but the tonnage moved from and through the Ohio and Mississippi river crossings direct to the Southeast. (Compton, Record, p. 822.)

The territory in which it was alleged Nashville could compete at an advantage over the Georgia jobbing centers was "*contiguous territory in the State of Georgia.*" (Record, p. 1051.) It was conclusively shown by the evidence that, so far as the Georgia territory is concerned, the striking down of the reshipping practice would not remove the alleged discrimination; that the abolishment of the reshipping practice would either have the effect of forcing down the rail rate to the basis of the river rate, or, if the rail rate were maintained into Nashville, resort would be had to the boat lines and grain would be drawn in on river rates of 6 cents or less and reshipped by using the rail rate out to practically the entire Southeast on just as available rates as at present exist under the reshipping practice.

In the face of this uncontradicted evidence and of the controlling influence of the Cumberland River, it can not be asserted that the reshipping practice creates any discrimination that the law condemns as undue or unjust. It gives Nashville no advantage in the Southeast which she would not enjoy by resort to her available means of water transportation, and her natural advantages of location and facilities for transporting this grain by water can not be overcome by abolishing the reshipping practice.

VARIATIONS IN THE EQUALIZER OF THREE CENTS AT NASHVILLE.

Originally the Rates from Nashville to the Southeast and Carolina Territory were Made Seven Cents Under the River Crossings, and the Equalizer of Three Cents Enabled Nashville to Reach all of this Territory.

At the hearing of the motion for a temporary injunction before the Commerce Court the suggestion was made that the equalizer used to reduce in practice the combination of locals on Nashville to basis of the protected through rate was in some instances in excess of 3 cents. Three cents is the equalizer on rates not only to Atlanta, which city had been used at the hearings as illustrating the case under discussion, but also to all other complaining points. Accordingly, at the taking of testimony before His Honor, Judge Mack, the matter of the varying equalizer was gone into and explanations were presented.

There was no evidence as to this matter at either of the hearings before the Commission, and the Commission did not refer to it in either of its reports. All points of destination which were considered by the Commission in its reports and pointed out by complainants or by the Commission were points of destination in Southeast territory, to which the 3-cent equalizer then applied and now applies.

Therefore, in a review of the order of the Commission the question of the variation of the equalizer can not properly be considered.

Suffice it to say, originally the equalizer was the same to all destinations, but the construction of new short-line railroads which fixed rates that were very much lower than combinations via Nashville, compelled the through rate via Nashville to be equally low; so that, in whatever instances the Nashville locals out remained unchanged (and they did generally so remain, for local economic reasons), the equalizer on through traffic via Nashville must needs be great enough to produce a through rate as low as the through rate via the new short line. The reshipping privilege at Nashville has nothing to do with it. (Record, pp. 443, 385.)

COMPLIANCE WITH COMMISSION'S ORDER MEANS DISCONTINUANCE OF RESHIPPING AT NASHVILLE, EXTENSION THEREOF TO GEORGIA POINTS BEING IMPRACTICABLE.

The alternative form in which the order of the Commission is expressed would appear to afford to the rail carriers extending through Nashville a means of preserving the reshipping practice at that place.

But, in reality, this can not be accomplished, *first*, because it is intrinsically impracticable to extend the practice to the ten complaining Georgia points without extending it also to all other jobbing points in the South, thus creating endless confusion (Barham testimony, Record, p. 390; Green testimony, Record, p. 650; Compton testimony, Record, p. 825), and, *second*, because the connections of the Nashville, Chattanooga & St. Louis Railway at Atlanta have officially informed it that they will not extend the practice to any of the complaining points, none of which, except Atlanta as a terminus, is on the lines of the defendant carriers. (Barham testimony, Record, p. 387.)

Accordingly, if the order is made effective *it must be done by the abandonment of the reshipping practice at Nashville.*

ARGUMENT.

I.

THE ORDER OF THE COMMISSION OF THE NINTH DAY OF JUNE, 1911, SHOULD BE ANNULLED AND SET ASIDE, BECAUSE IT WAS BASED UPON A CONSIDERATION OF EVIDENCE, MATTERS, AND THINGS NOT FOUND IN THE RECORD OR INTRODUCED AT THE HEARINGS.

The decree of the Commerce Court should be affirmed on the state of the pleadings.

The answer of the intervening respondent, and appellant here, the Interstate Commerce Commission, contains admissions that should dispose of the case without reference to the other questions involved. And the United States of America and the other appellants are bound by its action because they are in privity with the Commission, and its acts covered by the admissions are the very matters in issue in this litigation.

The admissions are decisive of the controversy in this case, because they reveal the very essence of the error on which the contentions of our adversaries are based.

The order of the Interstate Commerce Commission entered on the 9th day of June, 1911, which is found reproduced in the record at pages 135-6, after reciting that the reshipping privilege at Nashville was denied to dealers in the Georgia points, declared said privilege to be unlawful and to give undue and unreasonable preference and advantage to Nashville and to its dealers in grain and grain products, and to subject the Georgia points and their dealers to undue and unreasonable prejudice and disadvantage, and thereupon required the defendant carriers to cease and desist for a period of two years after August 1, 1911, from granting said reshipping privilege to Nashville and to its dealers so long as said defendants refuse and refrain from granting the same privilege to the Georgia points or either of them and to their respective dealers.

As to the course of the proceedings leading up to this order the answer of the Interstate Commerce Commission contains the averments found in paragraph III (Record, pp. 115, 116) as follows (the italics being our own):

> "That in said investigation and in arriving at its decison therein this respondent, as in duty bound under the law, weighed and considered all the facts and arguments presented by the petitioners herein, by other carriers, and all other parties to said proceeding; that in *forming its opinion and arriving at its conclusion this respondent, exercising its administrative functions and powers, considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge of this respondent in the performance of its duties and functions prescribed and set forth in the act to regulate commerce and the amendments thereto pertaining to the privileges of rebilling and reshipping;* said *rebilling and reshipping privileges exist at* that *from said reports and tariffs* it appears that *many interior points where no water competition ob-*

> *tains; it is therefore not competent, nor is it relevant, for said petitioners to allege that any particular fact or facts before this respondent in said proceeding are uncontradicted or conclusive in favor of the petitioners' contention; nor can the petitioners by judicial proceeding ascertain each and all the facts, circumstances, and conditions in regard to said transportation that were necessarily and properly considered by and which aided this respondent in arriving at its conclusions that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory.*
>
> "This respondent denies that there is, or can be, under the law, any complete record of all the evidence, facts, and circumstances before the Commission in determining that this, or any other practice by carriers, is unduly and unjustly discriminatory as between localities or persons, and respondent is advised and so alleges that the determination of said question, as to whether said admitted discrimination is undue and contrary to the provisions of said act to regulate commerce, is one wholly and exclusively within the jurisdiction of this respondent."

In the answer filed by the Government it is stated:

> "That a second full hearing was had and that in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission which states its conclusions, together with its decision, order, or requirement in the premises, *it found as a fact on all the information coming to its knowledge* that the granting to the dealers at Nashville of the reshipping privilege, fully described in the report, while denying it to the dealers at Georgia points was unlawful and violative of Section 3 of the Act." (Record, pp. 108-9.)

Thus the Government avers that the ultimate fact upon which the order was based was founded on "all the information coming to the knowledge" of the Commission which, in turn, in its own answer sets forth, as we have seen, in what manner it gained that information and that knowledge.

The effect of the foregoing judicial admissions is to place the facts therein set forth beyond the range either of needing evidence or of permitting dispute and it removes them from further controversy.

Thus, among other things, it becomes an undisputed fact that the Commission gained from "said reports and tariffs" on file with said Commission, but not introduced at the hearing, its information and knowledge that "said rebilling and reshipping privileges exist at many interior points where no water competition obtains," and, in this manner, without opportunity to the carriers to inspect said reports and tariffs or explain or contradict the matters therein contained, the Commission found itself able to conclude that the interior Georgia complaining points, at which no water competition obtains, were similarly situated and conditioned in comparison with Nashville, where controlling water competition does obtain, and that the existence of the rebilling and reshipping privileges at Nashville constitutes a violation of Section 3 of the act to regulate commerce unless said privileges were also extended to said interior Georgia points.

Thus, the very foundations for the report and order of the Commission were admittedly created by it through an *ex parte* investigation conducted by the Commission.

This Court has held in the Union Pacific case (222 U. S. 541) that courts may review an order of the Commission for the purpose of ascertaining whether the order is based upon substantial evidence produced at the hearing before the Commission. Interstate Commerce Commission v. Union Pacific R. R., *supra.*

And in the New Orleans Board of Trade case (decided January 20, 1913) it was held that the provision in the act to regulate commerce that gives to the parties the right to a full hearing also imposed upon the Commission the duty of deciding in accordance with the facts *proved.* Interstate Commerce Commission v. L. & N. R. R. Co., *supra.*

For the Commission to decide matters brought before it upon evidence not adduced at the hearings or upon facts not *proved* constitutes arbitrary exercise of power and is inconsistent with the protection guaranteed by the Constitution.

We realize quite fully the significance of the decisions of this Court to the effect that there is no power in the courts to review the orders of the Commission solely because the weight of the evidence that was brought forward at the hearings preponderates against the conclusions reached by the Commission, and that, in cases where the attack on the order of the Commission is based upon the charge that its findings and conclusions do not conform to the clear preponderance of the evidence, the courts are powerless to review the orders of the Commission if they find that there was some substantial evidence to support them.

Our present contention has no relation to this doctrine. The contention is that, since the statute gives the right to a full hearing, it follows that the only evidence which the Commission may at all consider in making its findings and reaching its conclusion is the evidence that was produced at the hearing. Consequently, if the Commission does go outside of the record to find support for its findings and orders, it is clear that, as to the evidence, matters, and facts so brought to the attention of the Commission, the parties have not had an opportunity for cross-examination and have been denied the full hearing which the statute affords.

The point upon which we here insist will, perhaps, be made clear by another view.

Suppose in a given case there were a contradiction in testimony with the preponderance, however, very strongly on one side of the contention, though there was substantial evidence on the weaker side. Let us assume further that the Commission makes findings, reaches conclusions, and passes an order in accord with the weaker side of the foregoing evidence. Such an order can not be reviewed by the courts.

Now let us suppose the Commission should, in every case where there is a dispute as to facts, make findings, reach conclusions, and pass orders, all contrary to the weight of the evidence.

Of course, there is also the supposable case in which the order of the Commission is without any evidence at all.

Finally, let us assume that in all the foregoing cases the Commission avowedly supplemented the evidence adduced before it by knowledge of matters and facts, whether relevant or material or not, and without the opportunity for inspection of documents or cross-examination of witnesses or introduction of evidence in contradiction or rebuttal.

Can it be thought that, in any of these cases, the parties to the proceeding had enjoyed the *full hearing* afforded by the statute, without which there would not be due process of law, or that the Commission disregarding all rules of evidence could capriciously make its findings by administrative fiat and thus exercise "a power possessed by no other officer, administrative body, or tribunal under our Government"? As was said by this court in the New Orleans Board of Trade case, *supra:*

> "Such authority, however beneficiently exercised in one case should be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Our contention, therefore, on this branch of the case is not that the order of the Commission is unsupported by substantial evidence, but that it is based upon a mistake of law and finds its only support outside of its statutory power.

Though an order will not be set aside solely because the weight of evidence produced at the hearings is contrary to the order, yet the court can not apply that doctrine to a case in which the Commission travels out of the record for information as to facts and matters considered by it in making its order. The Commission can not arbitrarily close a hearing and deny to a carrier the right to introduce evidence in its behalf or to cross-examine witnesses in opposition, simply because, and as soon as, some substantial evidence has been introduced that would support an order against the interests of the carrier. The Commission must weigh and consider all the evidence that may be reasonably offered, and it is presumed to determine the cases before it fairly and impartially and according to the weight of the evidence.

Like all other bodies created by law for the purpose of passing on and disposing of the property and liberty of persons, the presumption exists that its decisions will be fair and impartial and in accord with the preponderance of the evidence. So long as that presumption exists the courts will not review its orders, except only when they find that these rest upon no substantial evidence for support.

In all other cases its findings of fact and the conclusions therefrom drawn are given finality.

But if this presumption is rebutted by its own judicial admissions to the effect that its decisions on the facts were reached by consideration of matters *dehors* the record, the finality ordinarily given to them can not be applied. Consideration of the extraneous matters vitiates the findings, and, therefore, the order itself.

As the verdict of a jury, admittedly founded upon evidence or knowledge of the facts of the case extraneous to the trial, will be set aside upon proper application, though without the extraneous matters, the verdict would not be disturbed even if contrary to the weight of the evidence; so, also, must the findings and orders of the Commission be set aside whenever it is made to appear to the court in proper manner that they are not the result of a consideration alone of the evidence introduced at hearings given pursuant to the statute for such cases made and provided.

As it is beyond the statutory power of the Commission to deny to a party in a proceeding before it the right to cross-examine and introduce witnesses, so the Commission would be acting beyond its power if it declined to allow defendant to produce its evidence on the ground that it would be vain to do so after some substantial evidence adverse to defendant had already been adduced. Otherwise expressed, it must be true that the basis of some substantial evidence can afford support for an order only when all parties have theretofore been given a full hearing as required by the statute, at which there has been produced all the evidence that the Commission considers in making its orders.

The erroneous conception of the law that the Commission may base its decisions upon a consideration of matters and facts not proven by evidence adduced at the hearings would naturally tend to encourage the decision of its cases without reference to the weight of the evidence. Such a result would be deplorable and really unthinkable. *The substantial evidence rule can not be applied unless there has been a full hearing.* There has not been a full hearing if the Commission considers evidence not introduced according to law.

The New Orleans Board of Trade case is not at all in conflict with our contention, for in that case there was the full hearing prescribed by statute. The contention of the Government there was a matter of argument, to-wit: that the Commission had the legal right to go outside of the record, and, therefore, the order in question must be conclusively presumed to be supported by substantial evidence. It was not in that case admitted in the pleadings or otherwise judicially that the Commission did *in fact* go outside the record or act upon its own information. The Government insisted there that there could be no investigation whatever of the facts by the court, because, as it claimed, the Commission could draw on the whole universe to justify its order. The court denied this contention and said that it would investigate the facts, but like the Commission it could investigate only those facts and that evidence brought out at the hearings provided by law, and then if the court found that the record contained some substantial evidence to sustain the order it would not be disturbed.

In the present case, on the other hand, it is not a mere contention or a matter of argument that the Commission based its decision upon evidence not produced at the hearings, but it is *a fact* established by the admission of record made by the Commission, and it is no longer open to dispute. From that fact, it follows that there was not given the full hearing prescribed by the statute, and it, therefore, becomes wholly immaterial whether there is in the record of the *partial* hearing that *quantum* of evidence that would perchance, under other circumstances, serve to support the order of the Commission.

When the Commission admitted that it considered, as it had no right to do, extraneous evidence and matters and that it employed these in reaching its conclusions and in making its order, the implication at once arose that it would not have made the order without them; or, at least, it can not appear whether it would have done so or not. That is to say, no one can assert that the Commission would have made the same findings of fact, or reached the same conclusions, or passed the same order, upon a consideration of only a portion of the evidence which it did consider, and, therefore, it can not be said that it did all these things upon the evidence that was introduced at the hearings, and, consequently, not upon the basis of whatever substantial evidence there may have been in the record to support the order.

Inasmuch as there was not the full hearing prescribed by law, the Commission was without power to make its findings, or reach its conclusions, or pass its order, and, therefore, in making its findings, reaching it conclusions, and passing its order of June 9, 1911, it acted beyond its statutory power, and, consequently, its said action was and is null and void.

Furthermore, since it is beyond the power of the courts to make an order, they can not supply the omission of the Commission in this case. They must annul and set aside the Commission's order that was based upon illegal findings and then leave the matter to rest there.

The decree of the Commerce Court, annulling the order and setting the same aside, should be affirmed.

II.

THE RESHIPPING PRIVILEGE AT NASHVILLE HAVING BEEN COMPELLED BY THE CONTROLLING INFLUENCE OF THE COMPETITION OF CUMBERLAND RIVER, WHICH DOES NOT EXIST AT THE GEORGIA POINTS, THE ADVANTAGE AND PREFERENCE THEREBY GIVEN NASHVILLE ARE NOT UNDUE AND THE DISCRIMINATION IS NOT UNJUST.

We submit that the principle here involved was declared in the group of cases under the style of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, commonly known as the Peavey cases, and the essential similarity of the facts in those cases to the facts here is so close that a careful discussion of them will be fit.

The appeal was from the decree of the Circuit Court of the United States for the Western District of Missiouri. The question there for decision was whether the order of the Interstate Commerce Commission prohibiting the railroad companies from paying to the owners and lessees of elevators all compensation for the elevation of grain in transit should be set aside and annulled. Peavey, etc., v. I. C. C., 176 Fed. 409.

The Circuit Court annulled the order and this Court affirmed the decree.

The lines of the Union Pacific, which penetrated the grain producing districts of the far West, had their eastern termini at Kansas City and Omaha on the Missouri River. In order to secure prompt release of its cars, the Union Pacific contracted to make an allowance to owners and operators of elevators at those points for unloading the grain from the cars, the only practicable and modern method for doing this being by means of elevators. Other rail lines, *e. g.*, the Burlington, coming from the grain-producing territory to Missouri river points extended beyond them to St. Louis on the Mississippi River or to Chicago. In addition, there were other rail carriers, *e. g.*, Chicago Great Western Railway, whose lines beginning at the Missouri river points extended eastwardly to St. Louis or Chicago. Because the Union Pacific paid elevation allowances, the through grain-carrying roads for competitive reasons were thereby compelled to make the same allowance to the elevators, and similar conditions forced the third class of lines, namely, those originating at Missouri river points and extending eastwardly, likewise to make the allowance at Missouri river points.

The Commission having in its earlier reports sustained the validity of these allowances, nevertheless, in its later orders, 14 I. C. C. Rep. 317, 331, 510, in substance, declared the allowance to be illegal when made to owners of grain who, as incidental to elevation, treated their grain, because it gave them that opportunity.

In the language of Mr. Justice Holmes, the ground on which the payment to owners of grain was finally claimed to be a rebate, and therefore, illegal, was

> "that when the owners of the elevators owned the grain put into them they had the opportunity to perform other services to the grain in the way of treatment, cleaning, clipping, and mixing the grain, which, although not included under the term 'elevation,' are paid for by the railroad, which is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and an unjust discrimination."

The grain interests of St. Louis filed petitions against the Missouri river lines extending from the grain fields through the Missouri river points to St. Louis, charging discrimination against St. Louis, and in favor of Missouri river cities, in that if the St. Louis grain dealer purchased grain west of the Missouri River, shipped it through Omaha to his elevator at St. Louis, and then out to some eastern point, it would cost him three-fourths of a cent per hundred pounds more at that point than it would cost the dealer at Omaha, who had passed the grain through his elevator there.

Judge Sanborn answered this contention by saying that the two dealers were not similarly situated:

> "The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation which constitute *a controlling factor* at Omaha and Kansas City do not exist at St. Louis, and that city is many hundred miles further distant from the grain

> fields. *These facts extract from this difference every element of unjust discrimination or undue prejudice.* East. Tenn., V. & G. R'y Co. v. Interstate Commerce Commission, 181 U. S. 1, 12; Interstate Commerce Commission v. Ala. Mid. R. R. Co., 168 U. S. 144, 171, 175; L. & N. R. R. Co. v. Behlmer, 175 U. S. 648, 671, 674." (Italics ours.)

Diffenbaugh and others, representing the grain interests of Kansas City, exhibited their bill against the Commission, claiming that the enforcement of the orders of the Commission would tend to destroy the grain business of that city. The order in the last-named case had been directed against the through lines extending from the grain fields to the East. Speaking of the Commission's order which forbade payment of elevation allowances in this case, this court used the following language:

> "The Union Pacific made the allowances in question to elevators at its termini; *it had no motive to make them anywhere else.* The competitors of the Union Pacific, concerned in the Diffenbaugh case, were *compelled* by competition to make the same allowance at Missouri river points, but they also make it nowhere else."

And Mr. Justice Holmes, referring to the language of Judge Sanborn in the Peavey case, above quoted, said:

> "But, as remarked below, the Union Pacific could not be complained of on this ground (176 Fed. 424), and it would be impossible to deny the same right to competing roads, merely because, as the result of conditions, *one city would gain and another lose.* (Louisville & Nashville Railroad Company v. Behlmer, 175 U. S. 648, 44 L. Ed. 121, 20 Sup. Ct. Rep. 209.)"

That is to say, the roads that touched both St. Louis and Kansas City could not be prohibited from competing with the U. P. at Kansas City, though making similar elevator allowances, and, further, the fact that they did so make the allowances at Kansas City and refused to make them at St. Louis, where like competitive conditions did not require the allowances, did not constitute undue disadvantage and prejudice or unjust discrimination against St. Louis, though Kansas City might thereby gain and St. Louis lose.

Thus this court most emphatically declared the law to be that St. Louis could not be heard to complain of the advantage enjoyed by Kansas City at the hands of the Burlington line, which extended from West thereof through Kansas City to St. Louis and thus formed part of a through route from the grain fields to eastern or southern destinations.

The situation is precisely like that in the present case, wherein the Georgia points will not be heard to complain of the advantage enjoyed by Nashville. The stress of competition by the Cumberland River, which the rail carriers meet at Nashville, which does not exist at Atlanta or at any of the complaining points, constitutes the controlling factor at Nashville that "extracts from this difference every element of unjust discrimination or undue prejudice."

As at Kansas City and Omaha, the Union Pacific was found justified in making an allowance for elevation of grain that it carried from the grain fields on a local rate, which grain, having been elevated, moved out of these cities on a proportion of the through rate to the Mississippi River and to points east, north, and south, less than the local rates between those points, because of this "commercial necessity" so to do, and as the other lines serving the Missouri river points, whose railroads extended from the grain fields beyond the Missouri River to the east, north, or south, were found justified to do the same thing upon the grounds of compelling competition, so the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad should be found justified in similarly protecting their rate from the Ohio river crossings on grain moving thence via Nashville to the Southeast, so that it may be transported forward from Nashville on a proportional less than the local rate.

And just as the difference between the situation at the Missouri river points—where the need for elevation in transit and the competition of the carriers for transportation were found to be the controlling factors and to justify elevation allowances there—and the situation at St. Louis, a city *several hundred miles further distant* from the grain fields, justified the *denial* of the elevation allowance by the same carriers that accorded it to the Missouri river points in competition with the lines having their termini there, so, also, the difference between Nashville, where the need for reshipping and the competition between rail carriers and water lines for transportation constitute a controlling factor, and Atlanta and the other Georgia complaining points which are *several hundred miles farther distant from the grain* *fields* of the west and north than is Nashville, should justify the reshipping practice at Nashville and its *denial* at all of these other points. And the facts that thus distinguish the situation at Nashville from the situation at the Georgia points "extract from this difference every element of unjust discrimination or undue prejudice."

As in the Diffenbaugh case the competitors of the Union Pacific had no motive to make the allowance elsewhere than at the Missouri river points, so here the defendant carriers, competitors of the Cumberland River, have no motive to extend the reshipping practice elsewhere than at Nashville, and do not do so.

It is hardly necessary to dwell upon what is self-evident—that the elevation allowances at Missouri river points and the application of proportional rates beyond them to the East was a practice that included reshipping and yet something more.

The act to regulate commerce does not prohibit all preferences or advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable.

> "Subject to the two leading prohibitions that their charge shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers, as they were at the common law, free to make special rates looking to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and of their own situation and relation to it, and generally to manage their important interests upon

> the same principles which are regarded as sound and adopted in other trades and pursuits."
>
> I. C. C. v. Baltimore, etc., R. Co., 43 Fed. 37.

And the following excerpt from Interstate Commerce Commission v. Chicago Great Western Railway Co., 209 U. S. 108, 118, wherein the foregoing is approved, may be pertinent:

> "It must be remembered that the railroads are the private property of their owners; that while from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and commodities, yet in no proper sense is the public a general manager."

And, from the case involving the rates on Lake Cargo Coal, decided by the Interstate Commerce Commission March 11, 1912, Opinion No. 1806 (22 I. C. C. Rep. 604, 612, 613), we quote the following:

> "This Commission does not sit as a supreme traffic manager for the railroads of the country. Consideration of the policy which they may pursue is not a matter delegated to us so long as it does not infringe upon the prohibition of the law. *It is not our function to equalize commercial conditions or to establish zones of trade or bring markets into competition one with another.* * * * *The standards established by law which mark the jurisdiction of this body* do not permit us to substitute our judgment as to the wisdom of a certain policy of rate-making for that of the traffic officials of the railroads."

And, again, in the case of Ashland Fire Brick Company, *et al.*, v. Southern Railway Co., *et al.*, 22 I. C. C. Report, 115, 121, said:

> "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantage, to place one market in competition with another, or to treat all railroads as a part of one great whole, apportion to each a certain territory, or to require all to meet upon a common basis at all points."

It is submitted that the foregoing authorities render necessary the annulment of the order of the Commission herein complained of.

III.

THERE IS NO UNDUE DISCRIMINATION IN MAINTAINING THE RESHIPPING PRACTICE AT NASHVILLE, BECAUSE IT IS COMPELLED AND JUSTIFIED BY CIRCUMSTANCES AND CONDITIONS PREVAILING THERE WHICH DO NOT PREVAIL ELSEWHERE IN THE SOUTHEAST.

The final report and order of the Commission, ordering the reshipping practice discontinued at Nashville or extended to the named points in the Southeast, is based *solely* upon an alleged violation of Section 3 of the Act. This report concludes with the statement that the reshipping practice accorded Nashville constitutes "the undue and unreasonable preference and advantage and the undue and unreasonable prejudice and disadvantage, as between the parties to these proceedings, prohibited by Section 3 of the Act to Regulate Commerce." There never was any issue in this case as to the reasonableness of the through rates from the river crossings or from Nashville to the Southeast, the *sole* question passed upon and determined by the Commission was as to whether the reshipping practice constituted a violation of the Third Section of the Act. The evidence was directed and was confined to this issue by the Commissioner who heard the case, and the very order of the Commission requiring the carriers to show cause expressly limited the inquiry to the alleged discrimination as between Nashville and the complaining points with respect to the reshipping practice at Nashville, and required the carriers to show cause why the reshipping practice should not be discontinued at Nashville upon the ground that such discrimination was undue, unreasonable, and unlawful. Therefore, any suggestion or contention that with the elimination of the reshipping practice *lower* through rates to Southeastern territory from all Ohio river crossings and from Nashville would follow can not be urged in support of the Commission's order.

The Commission, in its final report and order, did not find that the reshipping practice was not *compelled* or *forced* upon the carriers at Nashville as a means of self-protection; it did not find that the water competition on the Cumberland River was not potential and controlling. On the contrary, it expressly stated in the final report at page 59 of the Record:

> "It is a recognized fact that the existence of the Cumberland River has produced conditions which

> have been reflected in freight rates and adjustments thereof to Nashville, but it is important to inquire just what effect the river has upon the traffic here involved." (21 I. C. C. 190.)

The Commission thus recognized as an established fact the existence of the water competition and that the *compelling* force of this competition had been reflected in the freight rates and adjustments to Nashville. The Commission then proceeds:

> "In meeting the competition on this grain traffic from the Northwest the carriers have not reduced the rates to Nashville in competition with the river, but they have left that city to the enjoyment of what traffic could be moved to that point at river rates of transportation for local consumption."

It is then pointed out that the river competition has been met only on the through movement by the adoption of the reshipping privilege at Nashville:

> "In other words, the present adjustment promotes both the local and the through grain business and adroitly keeps the lines of cleavage between them clear and distinct. The grain moving into Nashville locally, via the river and otherwise, can hardly compete with the through business to the Southeast under the present tariffs, and grain moving into and out of Nashville under the transit privilege can not very well compete with the local industry. This two-fold adjustment leaves little more that could be done to put Nashville on an advantageous basis as compared with all rivals in that territory.
>
> "*In respect to this river competition* it is important to note that it has not in fact reduced the rate to Nashville, nor the rate from the crossings to the

> Southeast, nor the rate from Nashville to the Southeast. The reshipping plan seems to have pretty well destroyed this river competition without reducing materially these charges. *The evidence is to the effect that reshipping was adopted to secure to the railroads a portion of the business.*"

The Commission does not find that the river competition did not originally compel and does not force the continuance of this practice. On the contrary, it is expressly stated by the Commission that the evidence shows it was adopted to secure to the railroads a *portion* of the business and that by the adoption of this practice the railroads in competition with the river lines had been enabled to control and secure for themselves the bulk of the traffic. And further the Commission recognizes that the compelling force of water competition at Nashville forced the rail lines to meet the competition on the through business, but it then proceeds to condemn what the carriers have done *because they met the competition of the through traffic and not on the local traffic.* The reshipping practice is to be condemned, according to the report of the Commission, because the carriers choose to compete for *a part* of the traffic and not to compete for the *remainder* thereof. It would seem that if it is lawful to compete for *all* the traffic at a given place, it is equally lawful to compete for a *part* of it and to abandon the rest. So if there is any ground for complaint that the Nashville carriers do not compete for all the traffic, *e. g.*, the local traffic, it is for Nashville to complain that it does not get the low rail rates on local shipments rather than that Atlanta or the rest of the world should complain of Nashville's misfortune.

The fact is that the carriers have avoided a reduction of the local rate to Nashville proper in competition with the boat lines and have dealt with the situation in such manner as to render their loss of revenue as small as possible.

It is recognized that the carriers must deal with this water competition, that it is potential and controlling, but the carriers are told that they can meet it in only one way, and *that the most disastrous way to them.*

Because the carriers have been forced to meet the competition on the *through* business, but have not reduced the rate to Nashville proper, can not constitute a violation of the Third Section or give to Nashville undue or unlawful preference over Atlanta and the other complaining points.

If the carriers did not see proper to meet the river rate to Nashville they certainly could not be compelled to do so. If they surrendered all of the business to the river lines and did not compete with the river lines on any business, local or through, their action could not be condemned.

On the other hand, if they sacrificed their revenues and cut the local rates to Nashville on all business to the river basis, the Commission, in its report, seemingly recognizes that the water competition would have materially reduced the rates to Nashville, but because the rail carriers compete for the through business and by the reshipping practice meet the river rates on this business, but do not compete for the local business, this action upon the part of the carriers is to be condemned as unduly discriminatory against *Atlanta and the other complaining points.* Just how this alleged discrimination would be removed by a reduction of the local rate to Nashville to 6 or 7 cents or anything less, it is difficult to conceive. With a 6-cent rate from the Ohio river crossings Nashville would be in a position, on at least as favorable rates as at present and without any reshipping practice, to reach every point in the Southeast, to which Atlanta or any of the other complaining points could ship, including the coast basing points. With a 7-cent rate Nashville, without the reshipping practice, could reach practically every point in the Southeast which Atlanta or any of the other jobbing centers in that territory could reach, with the exception of the coast basing points, and on the same through rates as are at present protected by the reshipping practice, and Nashville would have, so far as Southeastern territory is concerned, the same advantages which she at present enjoys under the reshipping practice, and really more to the extent of the unlimited right of detention.

If the reshipping practice at Nashville was not voluntarily established, in the first instance, and has not been voluntarily maintained, and if its establishment and the continuance of this practice were compelled and forced upon the carriers serving Nashville in order to meet the competition of the boat lines on the Cumberland River, then the practice complained of can not constitute undue and unreasonable discrimination against the complaining points, nor does it give undue or unreasonable preference or advantage to Nashville.

Especially is this true when the effect of abolishing the reshipping practice at Nashville would be, if Nashville were thereby entirely eliminated from the situation, to throw back or divert the traffic to the other Ohio and Mississippi river crossings and rail gateways; or, if the Nashville dealers should go to the river basis and avail themselves of the river rate, to force the carriers either to meet the river rate or to surrender it to the boat lines. If the traffic were surrendered to the boat lines, it could be brought to Nashville and reshipped by rail, according to the uncontradicted evidence before the Commission, on such combination of the rail and the water rates that Nashville could, without any reshipping practice, reach every point in Southeastern territory which she can reach today and with at least as favorable rate.

The construction which has been placed upon the provisions of the Third Section of the Act by this court shows that controlling and compelling competition is a complete answer to the charge of undue discrimination. In the following cases it has been expressly so held:

East Tennessee, V. & G. R. Co. v. I. C. C., 181 U. S. 1.
I. C. C. v. Alabama Midland R'y Co., 168 U. S. 144, and cases cited from the English courts.
L. & N. R. R. Co. v. Behlmer, 175 U. S. 648.
I. C. C. v. Diffenbaugh, 222 U. S. 42, 50.

In East Tenn., V. & G. R. Co. v. I. C. C., 181 U. S. 18, it is said:

> "The prohibition of the Third Section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary* and *wrongful* act of the carriers complained of as having given undue preference, and *does not relate to acts the result of conditions wholly beyond the control of such carriers.* And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. *For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point*, it can not be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

That the reshipping practice was not *voluntarily* given to Nashville, but was and is *compelled*, is established by the uncontradicted evidence before the Commission and before this court, and this is recognized in the report of the Commission. It was not established, nor has it been maintained to favor Nashville nor because the railroads preferred to do it. They had no alternative, and had they not established and maintained this reshipping practice they would have had either to surrender the traffic to the boat lines altogether or to sacrifice their revenues by reducing the local rate into Nashville to a level with the water competitive rate. If, without incurring the heavy loss which would have been sustained and the disastrous results which would have followed a reduction of the local rate to the river basis on all this traffic and to all points basing on Nashviile, they could compete upon the through traffic and did do so under compulsion, it is difficult to conceive how their act can be condemned as a violation of the Third Section, because they did not go further and meet the river rate on local traffic to Nashville.

Certainly the establishment and maintenance of the reshipping practice, by which they were enabled to compete for the through traffic, was rendered none the less involuntary and compelled because the *local* traffic was shared with the boat lines. Recognizing the potential and controlling force of the competition afforded by the Cumberland River, recognizing also that it will reduce the rates to Nashville and that the reshipping practice enables Nashville to meet the competition on the through traffic, the Commission, nevertheless, in its report, in effect, orders the carriers to discontinue the reshipping practice and denies to them the right to meet this competition in the way which will best conserve their revenues and enable them to protect the same. If the reshipping practice is abolished, it is certain that the carriers will again be brought face to face with this same competition and will be forced either to surrender the traffic to the boat lines or to reduce the rate to Nashville proper to the level of the water competitive rate.

While by means of the reshipping practice the rail lines serving Nashville have successfully met and dealt with the water competition, if they are denied the right to meet it in this way it will still have to be reckoned with and will be as potential and compelling as formerly. The fact that there is now not the same *actual* movement of grain by water into Nashville as at a former period does not militate against the *potential* force and possibilities of this river competition. The significant thing is not the amount of the actual movement, but the power of the grain dealers to resort to the river and transport this traffic to Nashville by boat lines, if the reshipping practice is abolished and the rail rates maintained. The Commission, in the case of City of Spokane v. N. P. R. Co., *et al.*, 21 I. C. C. R., at page 400, has said:

> "It is said that the amount of movement by water is so insignificant that it should be disregarded. The amount is not insignificant. If reference be had to the traffic which actually originates upon the Atlantic Seaboard a considerable percentage moves by water, *but the significant thing is not the amount of the movement, but the ever present possibility of that movement.* (Citing Alabama Midland case.)

And in the Alabama Midland case, I. C. C. v. Alabama M. R. Co., 168 U. S. at page 171, in speaking of the effect produced upon the rail rates to Montgomery by the Alabama River, this court said:

> "When the rates to Montgomery were higher a few years ago than now, actual, active water line competition by the river came in, and the rates were reduced to the level of the lowest practicable paying

water rates *and the volume of carriage by the river is now comparatively small; but the controlling power of that water line remains in full force and must ever remain in force as long as the river remains navigable to its present capacity.*"

The evidence established the fact that, before the rail lines were built from the west or north into Nashville, the Cumberland River brought in all the grain to Nashville, and that after the rail lines were constructed between Nashville and the west and north they did for some years compete but unsuccessfully with the boat lines, notwithstanding that free elevators were erected to protect the business, and that it was only after failure had been demonstrated that the reshipping arrangement was put in to meet the water competition. This arrangement had the effect, according to the Commission, of meeting the competition successfully, and the uncontradicted evidence clearly and unequivocally established that, if this reshipping privilege were abolished, boat line competition on the Cumberland River would at once become more active and as a result the railroads would have either to establish to Nashville a very low rate in competition with the river lines from the Ohio and Mississippi river crossings or to surrender the traffic to the water route altogether.

The carriers serving Nashville had a right "*to fight for the whole tonnage*," and where the boat lines "could readily prepare to take it all if left in undisturbed control of the traffic," the Commission has said *there is no reason why "the rail line may not meet the competition* *without subjecting itself to charges of discrimination from other quarters.*" (Bulte Milling Co. v. C. & A. R. R. Co., 15 I. C. C. 351.

The Commission does not find that the river competition at Nashville is not compelling or controlling. It recognizes the power of this competition and that it has produced conditions which have been reflected in freight rates and adjustments at Nashville; it recognizes that the rail lines have been compelled to meet, in some form, this river competition on grain traffic from the Northwest, but says that they have "adroitly" done so by the establishment of this reshipping practice. On the undisputed facts it must result, *as a matter of law*, that the rail lines serving Nashville have the legal right to meet this competition in the most effective way and "to fight for the whole tonnage without subjecting themselves to charges of discrimination from other quarters."

The Nashville, Chattanooga & St. Louis has only one route to the Southeast and that is via Nashville. The reshipping at Nashville enables this line to meet the water competition in bringing the grain to Nashville. The witnesses for the interveners have shown that grain can be brought to Nashville by water transportation with the present boat line facilities at 6 cents per hundred pounds, and that with modern equipment the river lines could handle it for 3 to 4 cents. The Nashville, Chattanooga & St. Louis, to protect its revenues and to hold this through traffic, is compelled to maintain this reshipping practice. If the reshipping privilege were abolished, the result would be to force this traffic to the boat lines reaching Nashville, or if the grain dealers were entirely eliminated the *river crossings* and not Atlanta or any of the other complaining points would be the gainers.

Under these conditions, disclosed by the uncontradicted evidence, it is not believed that the reshipping practice at Nashville can be held unjustly or unduly to discriminate against the jobbing centers in the Southeast or to give to Nashville any preference or advantage which the *law condemns as unjust or illegal,* and the order of the Commission so condemning it was *wholly beyond its powers to pronounce.*

When it is shown that the reshipping practice was not *voluntarily accorded* and has not been voluntarily maintained, but was the result of *controlling and compelling competition,* that the striking down of this practice would not remove the alleged discrimination, it necessarily follows that the Commission was *without the power* to condemn this practice as being "undue." A preference not wrongful or voluntarily given, but compelled by the force of circumstances beyond the control of the carriers, can not be unjust or undue or in violation of Section 3 of the act to regulate commerce.

IV.

IT IS NOT WITHIN THE PROVINCE OF THE COMMISSION TO OVERCOME THE NATURAL ADVANTAGES WHICH NASHVILLE, OWING TO ITS GEOGRAPHICAL SITUATION AND WATER TRANSPORTATION, HAS OVER ATLANTA AND THE OTHER COMPLAINING POINTS WITH RESPECT TO GRAIN MOVEMENTS INTO THE SOUTHEASTERN TERRITORY.

Nashville can avail itself of the water transportation on the Cumberland River connecting it with the Ohio and Mississippi and the grain producing section, and can draw to itself all the grain which it now handles by boat lines at very low water competitive rates. Neither Atlanta nor any of the other complaining points has any such natural advantage. Nashville is much nearer the grain producing section than is Atlanta or any of the other complaining points, and is naturally a primary market for the concentration of grain, and has always been so, not on account of any *artificial* means or *voluntary* privilege, but because of its *natural* advantages and *geographical* location.

In the *Chamber of Commerce of Chattanooga* v. *Southern Railway Company*, 10 I. C. C. Rep. 134, the Commission, after referring to Nashville's advantages by reason of its location on the Cumberland River and the effect of water competition via the Cumberland and Ohio rivers, said at page 134:

> "It is further shown that Nashville competes with Cincinnati, Louisville, Evansville, Cairo, and other Ohio river points in territory north and west of Nashville."

If this is true as to traffic from the east, *a fortiori* is it true that Nashville is entitled to compete with these river crossings on the grain traffic moving from the producing section of the west and northwest through all these river crossings to the Southeast. Its proximity to the grain section by water transportation and without dependence upon the rail lines can not be disputed, nor can it be denied that reshipping upon grain and grain products is accorded all of the river crossings with which Nashville is naturally classed and with which it competes. Through all of these river crossings grain and grain products can reach all points in the Southeast on the same through rates, which are protected by reshipping there, as are protected and applied via Nashville. Nashville is in a position, by reason of its location and its water transportation, *to compel this.* Neither Atlanta nor any of the other complaining points can *compel* or force the rail lines to establish reshipping, because they are not in a position to draw the grain to themselves from points north of the Ohio or west of the Mississippi by direct water transportation.

In its supplemental report of June 9, 1911, at page 193, 21 I. C. C. Report, this language is used:

> "While admitting much that is said in favor of Nashville and appreciating the zeal and persistency with which her natural advantages of location have

> been presented for our attention, we find that in the light of comparison with the other cities in the Southeast Nashville is not so dissimilarly situated with respect to this particular traffic as to entitle it to be singled out and exclusively granted the important and extremely favorable privileges denied to its competitors."

It will be noted that the Commission did not find that the Cumberland River did not exist nor that Nashville's alleged natural advantages of location were not real, nor did it find to be untrue the contention of the rail carriers that reshipping at Nashville was resorted to in order to meet the competition of the Cumberland River.

Nevertheless, it declared that the matters complained of by Atlanta and the other Georgia points constituted the undue and unreasonable preference and advantage in favor of Nashville and the undue and unreasonable prejudice and disadvantage against complainants, which are prohibited by Section 3 of the act to regulate commerce, and that they were unjustly discriminatory. In other words, the Commission by its order, ignoring the dissimilarity in the situation of Nashville, as compared with the Georgia cities, requires that the transit practice shall be precisely the same at all of these points, so that the fortunes of the Georgia points shall be equalized with those of Nashville.

Yet this is precisely what this court has declared can not be done. As we shall hereafter point out, it has been repeatedly held, with reference specifically to the Cumberland River and with reference generally to navigable streams, that their presence *does* constitute a controlling influence with reference to rates and practices compelled by competitive conditions.

In the recent case of Interstate Commerce Commission v. Diffenbaugh (the Peavey case), 222 U. S. 22, 24, it was expressly declared "that the law does not attempt to equalize fortune, opportunities, or abilities." It will be recalled that St. Louis Traffic Bureau had complained in behalf of St. Louis grain interests against the carriers there that they were withholding from St. Louis the elevation privileges extended to like interests at Kansas City and other Missouri river points. The court justified the practice at these Missouri river points and the withholding of it from St. Louis, (1) as to the St. Louis carriers because they were in competition at the Missouri river points and were thus compelled to apply the privilege, and (2) as to the Union Pacific, which reached the Missouri river points and not St. Louis, because it was entitled to a release of its cars at the termini of its road and could lawfully make a reasonable allowance for the performance of the service therein involved.

The decision was that St. Louis could not be heard to complain of undue disadvantage as compared with Kansas City, the dissimilarity of conditions justifying difference in practice, and it was not the province of the law to equalize fortune, or opportunities, or abilities. The dissimilarity of conditions between those cities consisted in the force of competition at Kansas City and Omaha with the Union Pacific, a rail carrier, which competition did not exist at St. Louis.

As a matter of law, the competitive conditions at Nashville produced by the Cumberland River must be held to be a condition at least as dissimilar from the condition at Atlanta or the other Georgia points where there is no such navigable stream.

The Commission itself in a number of cases has recognized the principles herein involved.

For example, in *S. S. Quimby, et al.*, v. *Maine Central Railroad Co.*, 13 I. C. C. Rep. 246, the Commission stated the contention of complainants thus:

> "In the above case complainants, situated in the eastern portion of Washington County, Maine, allege that by reason of their location they can not take advantage of the milling in transit privilege on corn, although their competitors at Bangor and Lewiston, Me., can do so, and, therefore, allowance of the transit privilege at Bangor and Lewiston constitutes undue discrimination against complainants."

Of this contention it said:

> "That the disadvantage under which complainants labor is *primarily due to their unfavorable location,* and that it is not the purpose of the Commission to overcome an advantage of this kind by adjustment of transportation charges."

Again, in *Squire* v. *Michigan Central Railroad Co.*, 4 I. C. C. Rep. 515, the Commission held that:

> "It is not the province of the Commission to so fix rates as to overcome the advantages which one producer has over another arising from his geographical situation."

And in *Chamber of Commerce of Minneapolis* v. *Great Northern Railroad Co., et al.*, 4 I. C. C. Rep. 230, it was said:

> "A milling town possessing *great natural, acquired and improved advantages* for the carrying on of that industry, *and favorably situate in point of distance to a large grain-producing region, is entitled to the benefits arising from its location*, and carriers of grain to that point and to a competing town considerably more remote from points of production, and in other particulars less advantageously located, *are not justified in making rates on grain to the competing towns which destroy the advantage the former is entitled to enojy.*
>
> "Neither the Commission nor the carriers are charged with any *parental oversight over localities*, or authorized to *stimulate them with artificial helps to prosperity.*"

And to the same effect is Brewer, *et al.*, v. C. G. R'y Co., 84 Fed. Rep. 268, where it is said:

> "Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. *There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate an increased commerce.*"

"Natural advantages of location are neither to be enlarged nor minimized by the Commission."

Enterprise Manufacturing Co. v. Ga. R. R. Co.,
12 I. C. C. Rep. 451.

So we say again, the question to be decided is in the end a question of law and ruled by the principles stated.

It is a question of law since there is no dispute as to the facts. Cumberland River is now navigable by vessels carrying grain from the grain fields of the west to Nashville. There is no such condition at Atlanta or the other jobbing centers.

Grain now moves and always has moved into Nashville from the producing section by water and will continue so to move if the rail lines retire from the traffic. There is no such condition at Atlanta or the other jobbing centers.

Nashville, by reason of its location and natural advantages, is a primary grain market and was the first great concentrating point for the handling of this traffic moving to the Southeast. It concentrated and handled grain before the other Ohio and Mississippi river crossings had rail lines to the Southeast or were concentrating points for the handling of this traffic, has for years been classed and in competition with these river crossings, and is situated 289 miles northwest of Atlanta on an arm of the great western waterways and connected with and can avail itself of water transportation from the grain producing section.

When the rail lines from the north and west to Nashville were constructed they met compelling and controlling competition at Nashville in this river competition. Are they to be penalized for meeting the water competition vigorously and effectively and in a way which will best protect the revenues of the carriers and enable them to handle the traffic in competition with the boat lines or with the rail lines from the river crossings?

Congress has placed no limit on the right of rail carriers to meet such competition in the most practical manner which they may find possible.

The material dissimilarity of the circumstances and conditions at Nashville as compared with those at Atlanta and the other complaining points in the Southeast is established beyond controversy by the evidence. The order of the Commission must be based upon the facts shown by the evidence introduced before it. Controlling facts are established beyond controversy by this evidence, which demonstrate that the reshipping practice, measured by the well-recognized tests announced by this court, does not constitute or create any discrimination which the law condemns.

V.

THERE WAS NO VALID BASIS FOR THE COMMISSION'S ORDER AND THE SAME SHOULD BE SET ASIDE AND ANNULLED AS WHOLLY BEYOND ITS POWERS.

It has been shown that there was no substantial evidence before the Commission to support its order. Moreover, the Commission has disregarded the uncontradicted evidence before it and condemned the practice of reshipping at Nashville as creating an undue and unlawful discrimination against Atlanta and the other complaining points when, under the interpretation placed upon Section Three of the Act by this court, and upon the facts disclosed by the uncontradicted evidence, whatever advantage Nashville enjoys over Atlanta or the other Georgia points can not be condemned as undue or unlawful.

The Commission can not proceed to condemn the practice by substituting its own experience or expert knowledge or other means of information for the testimony and record made in the course of the hearing. To sustain the order of the Commission there must be *substantial evidence* regularly taken and placed in the record forming the basis for the report and order of the Commission. Without this, the order is beyond its powers, illegal and void.

> I. C. C. v. Louisville & Nashville Railroad Co., decided Jan. 20, 1913.

All of the evidence which was before the Commission in this case is in the record before this court under a certificate from the Commission that it is all of the evidence introduced upon the hearing, and an examination of this record will convince that there is no conflict or dispute as to the controlling and determining facts. The facts proven by this evidence introduced at the hearing can not be disregarded, and since, upon the undisputed facts, the Commission has reached a conclusion which is contrary to law, in that it has condemned as unduly discriminatory this practice, which under the facts proven can not be held to create unjust or undue discrimination, then its order is void and must be set aside.

VI.

THE ORDER OF THE COMMISSION IS VOID ON ITS FACE, BECAUSE IT NECESSARILY RESULTS IN A DISCRIMINATON AGAINST NASHVILLE IN COMPARISON WITH OHIO RIVER CROSSINGS.

It is evident that the order of the Commission can be obeyed only by withdrawing the reshipping practice at Nashville.

Neither the Louisville & Nashville nor the Nashville, Chattanooga & St. Louis can alone or together extend this practice to all of the complaining points, as their lines reach only two of these points and do not extend south beyond any of them. The order of the Commission undertakes to extend the reshipping practice not only to Atlanta, but to numerous other points scattered throughout the Southeast, and a compliance with the order by extending the practice to the complaining points would mean the spreading of this practice to the entire Southeastern territory and to every point therein which might desire it. The rail lines serving this territory have persistently declined to extend reshipping, and the lines serving Nashville are powerless to compel this. And yet these other lines are free to continue reshipping at all of the other river crossings—and it is shown that reshipping exists in some form at every river crossing from Cincinnati south.

Now, the effect of the Commission's order is to deny to Nashville what many other river crossings enjoy, to deprive her of this ancient practice which she has had for forty years. Before there was a rail line to the Southeast from any other river crossing, Nashville was drawing this grain to herself by water and sending it by rail to Southeastern territory. The other crossings and the rail lines serving these crossings found Nashville enjoying this traffic and supplying the Southeast. We have seen that they commenced to *compete with Nashville* for a share of the traffic. Nashville had reshipping *before* it was established at any of the other river crossings.

The rail lines serving the other crossings are permitted, through reshipping, to compete on this through traffic and are all equalized so that the through rates to the Southeast through any or all these crossings are the same and all crossings are equalized and kept on a parity as to this traffic.

Nashville located on an arm of the great western waterways connecting it with these river crossings, having not only rail connections but direct water transportation from the producing sections of the west and northwest, is by the order of the Commission now to be taken out of this class, its natural advantages and geographical location are to be totally disregarded, and it is to be classed with interior jobbing cities in the consuming territory hundreds of miles farther south and to that degree more distant from the western grain fields, having no water transportation, and, therefore, not to be classed with the river crossings or rail gateways.

So, the natural effect of the order of the Commission is to enforce the abolition of the reshipping practice at Nashville, the result of which must inevitably be to remove Nashville from the class including the other river crossings, all of which enjoy with Nashville the advantages of location on the water basin, and to place Nashville finally in the class with Montezuma, Augusta, Atlanta, Rome, Albany, and even Valdosta, the complaining Georgia points.

Such a result operates to the undue disadvantage and prejudice of Nashville and unjustly discriminates against it and the carriers which serve it, as compared with the Ohio river crossings and the carriers at those points there, in competition for the grain trade of the Southeast.

The effect of the order would be to remove Nashville from its natural classification with the other river crossings and to tie it into indissoluble association with, forsooth, Valdosta and Dublin. There is nothing in its order that distinguishes these two small points from Atlanta or Rome or Augusta or Macon.

What the Commission has thus attempted to do this court has said it can not do. In Interstate Commerce Commission v. C. R. I. & P. R'y, 218 U. S. 88, 102 (Burnham-Hanna-Munger case), Mr. Justice McKenna, speaking for the court, said:

> "The outlook of the Commission and its powers must be greater than the interests of the railroads or of that which may affect those interests. It must be as comprehensive as the interests of the whole country."

And he declared that—

> "From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. *They are expected to be exercised in the coldest neutrality.* The Commission was instituted to prevent discrimination between persons and places. It would, indeed, be an *abuse of its powers* to exercise them so as to cause either."

If, as we submit, it was shown by the uncontradicted evidence, Nashville by her advantages of situation and location is properly a river town having water competition and is on that account entitled to the benefits of competition in transportation in like manner as they are now enjoyed by other river crossings, then it necessarily follows that the order which deprives it of those benefits, taking Nashville from the class with Ohio river crossings and placing it in the class with far distant Valdosta and Dublin, leaving to the other river crossings the natural advantages of their location, is an abuse of power by the Commission and an exercise of authority with which it is not by law endowed.

The enforcement of the order would entail upon the carriers an enormous loss of revenue, either by a reduction of rates into Nashville or by a deflection of much of the business to the water routes or to the Ohio river crossing lines. The resulting condition would present an unjust discrimination against them as well as against the Nashville grain interests. An order having such necessary consequences can not stand.

Upon the authorities cited and for the reasons set forth in this brief, we ask the court to declare the order of the Commission of June 9, 1911, to be null and void, and to affirm the decree of the Commerce Court annulling and setting same aside.

Respectfully submitted,

Henry L. Stone,
Albert S. Brandeis,
Attorneys for the Louisville & Nashville Railroad Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

No. 706

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, W. S. DUNCAN & COMPANY ET AL., APPELLANTS,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, NASHVILLE GRAIN EXCHANGE, AND NASHVILLE BOARD OF TRADE, APPELLEES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

REPLY BRIEF AND ARGUMENT ON BEHALF OF APPELLEES, THE NASHVILLE GRAIN EXCHANGE AND THE NASHVILLE BOARD OF TRADE.

This case is before the Court upon the appeal of the United States, the Interstate Commerce Commission and certain grain dealers in the State of Georgia, for the purpose of securing a reversal of a decree of the Commerce Court, which annulled an order of the Interstate Commerce Commission. Suits to annul this order of the Interstate Commerce Commission were begun in the Commerce Court by the Nashville Grain Exchange and the Nashville Board of Trade in one case, and by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway in a separate case; and in the Commerce Court the two suits were consolidated and heard together, and the order of the Interstate Commerce Commission complained of was finally annulled and enjoined.

I.

Statement of the Case.

Because not attacked as in any way inaccurate, and for reasons of convenience and brevity, we adopt the following statement of the case from the opinion of the Commerce Court herein:

> "This proceeding was instituted for the purpose of obtaining a judgment annulling an order of the Interstate Commerce Commission made on June 9, 1911, requiring the Louisville & Nashville Railroad Company, hereafter called the L. & N., and the Nashville, Chattanooga & St. Louis Railway Company, hereafter called the N., C. & St. L., to cease and desist for a period of two years from and after August 1, 1911, from granting to Nashville, Tenn., and to dealers in grain, grain products and hay located at Nashville, the privilege of rebilling or re-

shipping grain, grain products, and hay from Nashville, so long as said railroads should refuse and refrain from granting said privilege of rebilling or reshipping grain, grain products, and hay to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome and Athens, Ga., or either of them, and to the dealers in said commodities located in said cities.

"The L. & N. owns and operates a line of railroad from Louisville, on the Ohio River, in Kentucky, to Nashville, Tenn., on the Cumberland River, and from Nashville to Birmingham and Montgomery. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Ga. It has a line of railroad running from Louisville and Cincinnati to Atlanta, but does not reach Atlanta via Nashville.

"The N., C. & St. L. owns and operates a line of railroad from Hickman, Ky., on the Mississippi River, to Nashville, crossing the Tennessee River at Johnsonville, and from Nashville to Atlanta via Chattanooga. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Ga. The rebilling or reshipping privilege condemned by the order of the Commission is as follows:

"On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi River crossing points, such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N., C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destinations in Southeastern and Carolina territory; and on such reshipments so rebilled, the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi River crossing, via Nashville, to any given destination in said territory, shall exactly correspond with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi River crossing points to its final destination without having been stopped in transit at Nashville.

"In the case of *W. S. Duncan & Co. et al.* v. *N., C. & S. L. Ry.* (16 I. C. C. Rep., 590), the Commission held this reshipment privilege above described to be an illegal device by which grain, grain products, and hay might be transported at less than the tariff rate applicable thereto, and also that it gave to Nashville an undue and illegal preference and advantage, and subjected other points in the Southeast to unjust and unreasonable prejudice and disadvantage. The order of the Commission, however, in the case cited, was held in abeyance until further consideration could be given to the general question of the validity of transit privileges. The matter was further considered by the Commission, and in the case entitled, 'In the Matter of Substitution of Tonnage at Transit Points' (18 I. C. C. Rep., 280), the Commission refused to condemn transit privileges as such, but notified the carriers that such privileges must be carefully policed so that their use should not violate the law.

"In view of the conclusion reached in the case last cited, the Commission cited the parties in the case of *W. S. Duncan & Co. et al.* v. *N., C. & St. L. Ry. et al.*, to appear and show cause why the order theretofore issued therein should not be changed and modified so that it would require the defendants therein to cease and desist from discriminating in any respect whatever between Nashville, Tenn., and Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, all located in the State of Georgia, and the shippers, consignees and dealers, respectively, with respect to transit and reshipping privileges and practices as pertaining to grain, grain products, and hay, upon the ground that such discrimination was undue, unreasonable and unlawful. After a full hearing on this order to show cause, the Commission made the order complained of in this proceeding.

"The Commission, in concluding their report which resulted in said order, used the following language:

" 'After a careful consideration of all the pertinent facts and circumstances, we are of the opinion and find that the matters and things complained of herein constitute the undue and unreasonable prejudice and disadvantage as between the parties to this proceeding prohibited by Section Three of the Act to Regulate Commerce.'

"We may start, then, with the proposition admitted that the reshipping privilege existing at Nashville is not unlawful in itself or the Commission would not have framed the order in the alternative. (*Penn. Refining Co.* v. *W. N. Y. & Penn. R. R.*, 208 U. S.,

> 208). The discussion of the whole matter seems to be narrowed to two propositions: (1) Is the reshipping privilege existing at Nashville a violation of Section Three of the Interstate Commerce Act with reference to the Georgia points mentioned in the order? (2) The Commission having found that it is a violation of said section, may this Court review said finding?"
>
> Trans., pp. 1101-3.

The Commerce Court held that the reshipping practice existing at Nashville was not an undue or unlawful discrimination against the Georgia points, in violation of Section Three of the Interstate Commerce Act; and that the undisputed evidence before the Commission had so demonstrated.

The Commerce Court accordingly annulled the order of the Interstate Commerce Commission pronounced as the result of the second hearing before the Commission of the case of *W. S. Duncan & Co. et al.* v. *N., C. & St. L. Ry. et al.*, 21 I. C. C. Rep., 196; and defendants in said suit in the Commerce Court have appealed to this Court, and assigned errors.

The main question presented to this Court is: Did the Commerce Court err in holding that by the undisputed evidence before the Commission it was established that the reshipping practice existing at Nashville was not an undue discrimination against the Georgia points under Section Three of the Act?

It is true that in the brief filed by the Commission in this Court it is insisted that there was some evidence before the Commission to establish that the reshipping practice at Nashville violated Section Two of the Act. We shall see, however, that the Commission itself did not find any violation of Section Two of the Act, and we shall see that Section Two of the Act is wholly inapplicable to any aspect of the case.

II.

A Preliminary Point Conclusive on the Question of the Invalidity of the Commission's Order Annulled By the Commerce Court, and Conclusive of Appellees' Right to an Affirmance in This Case.

Before answering the assignments of error urged by the appellants, we desire to briefly present a preliminary and fundamental proposition as the result of which we insist it stands *admitted* that the Interstate Commerce Commission violated the law and exercised powers not conferred on it by Congress when it condemned the reshipping practice at Nashville as an undue discrimination against the Georgia cities.

As the result of recent decisions of this Court it is now definitely and clearly established that in pronouncing the order condemning reshipping at Nashville, or any other order which it makes as the result of a "hearing," the Interstate Commerce Commission must only consider evidence, facts and circumstances developed *at the hearing*, which the affected parties know about and have the opportunity to rebut, refute and explain.

> *Int. Com. Comm. et al. v. Louisville & Nashville R. R. Co.* (the New Orleans Board of Trade case), decided January 20, 1913, 226 U. S.
>
> *Int. Com. Comm. v. Balto. &c. R. Co.*, 226 U. S., 14-20.

It is admitted in the case at bar that the Interstate Commerce Commission condemned the reshipping practice at Nashville, not only upon the facts and evidence developed at the hearings of the case before the Commission, but that it also grounded the order annulled in this case by the Commerce Court in *large part* upon the *private information* of the commissioners, and alleged statistics, reports and facts not mentioned nor developed at the hearing at all, and which these appellees had no opportunity to refute, rebut or explain.

In the *sworn answer* filed by the Interstate Commerce Commission in this case in the Commerce Court it is averred that the Commission condemned the reshipping practice at Nashville, not only upon the evidence submitted to it at the two hearings, but that, in addition, it conducted and relied upon an *ex parte investigation* also. The sworn answer of the Commission, after setting out the fact that before condemning the reshipping practice at Nashville it conducted two hearings at which the parties appeared and submitted a large volume of testimony, then avers and admits that in addition to these two hearings the Commission conducted a further investigation; and the answer then avers:

> "That in said investigation and in arriving at its decision therein this respondent, as in duty bound under the law, weighed and considered all the facts and arguments presented by the petitioners herein, by other carriers, and all other parties to said proceeding; *that in forming its opinion and*

arriving at its conclusions this respondent, exercising its administrative functions and powers, *considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent*, together with *other facts coming to the knowledge of this respondent in the performance of its duties and functions prescribed and set forth in the Act to Regulate Commerce and the amendments thereto pertaining to the privileges of rebilling and reshipping*; that from said reports and tariffs it appears that said rebilling and reshipping privileges exist at many interior points where no water competition obtains; it is therefore *not competent, nor is it relevant*, for said petitioners to allege that *any particular fact or facts* before this respondent in said proceeding were uncontradicted or conclusive in favor of the petitioners' contention; nor can the petitioners by *judicial proceedings ascertain each and all the facts, circumstances and conditions* in regard to said transportation that were necessarily and properly considered by and which aided this respondent in arriving at its conclusion that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory.

"This respondent denies that there is, or can be, under the law, *any complete record of all the evidence, facts and circumstances before the Commission* in determining that this, or any other practice by carriers, is unduly and unjustly discriminatory as between localities or persons, and respondent is advised, and so alleges, that the determination of said question, as to whether said admitted discrimination is undue and con-

> trary to the provisions of said act to regulate commerce, is one *wholly* and *exclusively* within the jurisdiction of this respondent."
>
> Answer of Int. Com. Comm., Par. III, Trans., pp. 115, 116.

And the truth of the foregoing averments in the answer is attested by the oath of the Chairman of the Interstate Commerce Commission, who swears that he participated in said investigation, and who is the member of the Commission who wrote the report and finding condemning the reshipping practice at Nashville.

Trans., p. 118.

We submit that in the above-quoted sworn answer of the Commission it is admitted of record in this case, and on this appeal, that the Interstate Commerce Commission, in condemning the reshipping practice at Nashville, grounded its report and order in large part upon an investigation it conducted in violation of law and in violation of the rights of the parties who were entitled to a "hearing." For convenience, we quote from the case of *Int. Com. Comm. et al.* v. *L. & N. R. R. Co.* (decided January 20, 1913), *supra*, the following:

> "On the appeal here, the government insisted that while the Act of 1887 to regulate commerce (24 Stat. 379, pp. 14, 15, 16) made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, p. 15) that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge

was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S., 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

. . . .

"4. The Government further insists that the Commerce Act (26 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute. The information gathered under the provisions of Section 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm.* v. *Baird*, 194 U. S., 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to sup-*

> *port the finding. Int. Com. Comm.* v. *Baltimore &c. R. R.*, 226 U. S., ——."

And in the case of *Int. Com. Comm.* v. *Baltimore &c. R. R.*, 226 U. S., 20, this Court, speaking through *Mr. Justice Holmes*, said:

> "It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, &c., to establish the switch. We remark that it is stated in the Commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. *It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them.* See *Washington ex rel. Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S., 510, 525. Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified, so that matters of law are saved."
>
> 226 U. S., 20.

In the above-quoted sworn answer of the Commission in the case at bar it is admitted that they considered so many facts privately known to the members of the Commission, and so many facts and circumstances not developed at the hearing, that these outside "facts, circumstances and conditions" are impossible of ascertainment "by judicial proceedings." This, we submit, reveals an intolerable situation, if parties to proceedings before the Commission are to have the benefit of a "hearing" before it, and the right to any judicial review of an order of the Commission; and this, we submit, establishes the invalidity of the Commission's order in the case at bar, the correctness of the *result* arrived at by the Commerce Court, and consequently appellee's right to an affirmance.

To be sure, the Commerce Court did not ground its annullment of the order of the Commission in question upon the consideration above noted. But the order and final decree of the Commerce Court did absolutely and wholly set aside and annul the order of the Commission, and gave to appellees all the relief they prayed for or could obtain.

The law gives to the party *aggrieved* an appeal from a final decree of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reasons, or recited an insufficient one, for a judgment admitted by the appellee to be correct (*Corning* v. *Troy Iron & Nail Factory*, 15 How., 451, 464; *Penn. R. Co.* v. *Wabash &c. R. Co.*, 157 U. S., 225; *Silsby* v. *Foote*, 14 How., 218). The question before an appellate court is, was the judgment of the court below correct—not the ground upon which the judgment professes to proceed. In other words, this Court will not review and reverse a judgment which is correct, although the reasons given by the court below for its rendition are erroneous. Where the judgment rests upon sound principles of law this Court will affirm it, although the court below gave a wrong reason therefor (*Sullivan* v. *Iron Silver Mining Co.*, 143 U. S., 431). Appellees are always heard in *support* of a decree of the court below, but not for its reversal.

It results that while we could not appeal from the judgment of the Commerce Court in our favor, because said court put its judgment annulling the order of the Commission upon a ground different from that above suggested, we can be heard, in affirmance of the judgment below, to present the foregoing conclusive point, not assigned by the Commerce Court as the reason for the rendition of its judgment; and this Court will affirm the judgment of the Commerce Court, which reaches the right *result*, independently of the reasons suggested by the Commerce Court for its judgment.

We will hereinafter present the view that the judgment of the Commerce Court annulling the order of the Commission is sound and correct upon the reasons assigned by that court, and we do not want to be understood as suggesting that the Commerce Court annulled the order of the Commission in this case upon any erroneous ground. We do insist that the mere fact that the Commerce Court, in its entirely sound and correct judgment in the case at bar, did not assign as a reason for that judgment the admissions in the answer of the Commission establishing that the Commission violated the law in condemning the reshipping practice at Nashville by going outside of the facts developed at the hearings, does not subtract from our right as appellees to now suggest that reason as one which, under the practice, this Court will notice, and upon which it will ground an affirmance of the *correct result* reached by the Commerce Court.

There is no way your Honors can know that the Commission would have condemned the reshipping practice at Nashville if it had not, as it admits, *unlawfully* considered many facts and circumstances resting within the knowledge, and ascertained by the *ex parte* investigations, of the Commission. We were entitled to have our defense to the complaint of the Georgia cities passed upon, in the first instance at least, by the Commission upon a full consideration of only the facts and circumstances upon which a legitimate order could be founded. In the case of *Texas & Pacific* v. *Int. Com. Comm.*, 162 U. S., 238, this Court said:

> "The defendant was entitled to have its defense considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions *upon which a legitimate order could be founded.* The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and *supported by competent evidence*, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was."
>
> 162 U. S., 238.

The above quoted opinion seems conclusive upon the proposition that the decree of the Commerce Court annulling the order of the Commission in this case, reached the right *result*, and that the Court cannot now do anything but affirm the judgment annulling the Commission's order, and let the Commission hereafter, if it wants to condemn the reshipping practice at Nashville, proceed according to law, and base its judgment *entirely* upon facts and circumstances *lawfully* presented at a *hearing*.

We respectfully submit that an affirmance of the decree of the Commerce Court annulling the order of the Commission in the case at bar should be grounded upon the fundamental and controlling point presented under this head of this brief, without the necessity of considering any of appellant's assignments of error, or any other question in the case, as to what would have been a lawful order of the Commission in the case at bar had the Commission not undertaken to exercise its power in an admittedly *unlawful way and manner*.

ANSWER TO ASSIGNMENTS OF ERROR, ARGUMENT AND AUTHORITIES.

Under appropriate heads we will now endeavor to answer the errors assigned by our adversaries, and the several attacks made by them upon the correctness of the holding of the Commerce Court. It will conduce to brevity and avoid repetition, since we are answering more than one brief of our adversaries, to group our discussion of the case somewhat differently from the order of discussion followed in any one of the briefs which we are answering.

I.

From the Undisputed Facts Developed at the Hearings Before the Commission, it Results, as a Matter of Law, that the Reshipping Practice Established and Maintained by the Rail Lines at Nashville Cannot Amount to an "Undue" or "Unlawful" Discrimination Against the Complaining Georgia Points, Under Section Three of the Act; and that Consequently the Order of the Commission Annulled by the Commerce Court Was Beyond the Power of the Commission to Pronounce.

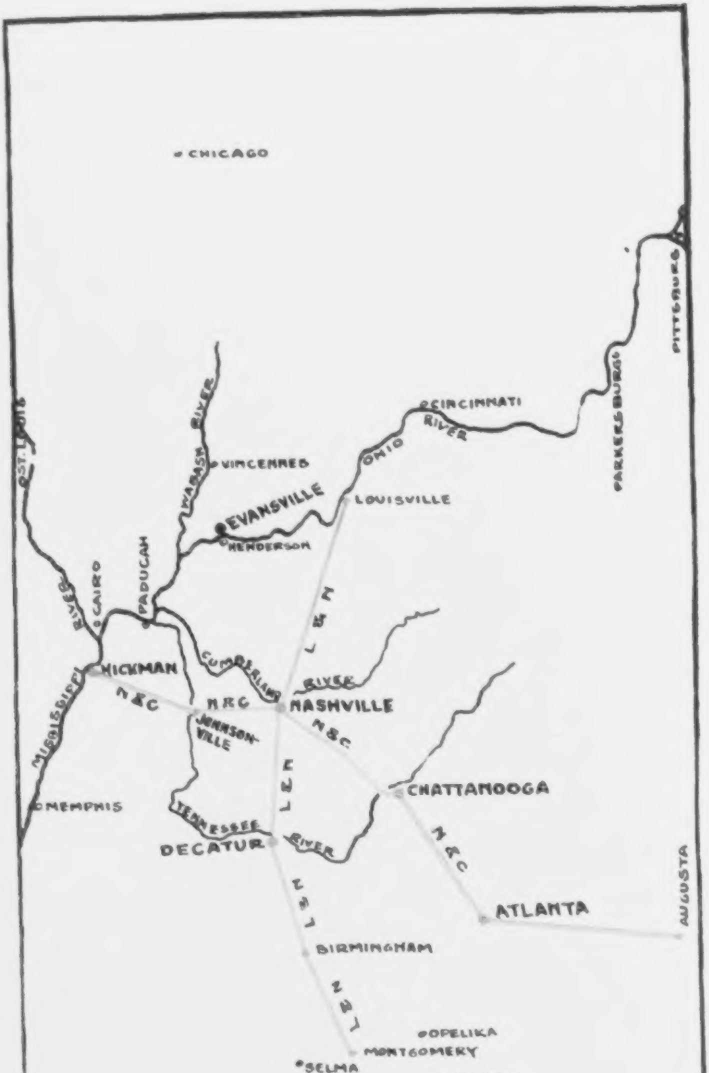
Presenting the above proposition will involve: (A) the undisputed facts developed at the hearings before the Commission; (B) the law applicable to these undisputed facts; and (C) answering positions of appellants with reference to the law as applied to the undisputed facts.

A.

The Undisputed Facts Developed at the Hearings Before the Interstate Commerce Commission.

For the sake of convenience and brevity we here quote and adopt the opinion and finding of the Commerce Court with reference to the undisputed facts lawfully developed before the Interstate Commerce Commission showing the cause of the establishment and continuance of the reshipping practice at Nashville. This statement of the Commerce Court of these undisputed facts is *entirely accurate*; and the objections of appellants to this finding of the undisputed facts by the Commerce Court will be hereinafter noticed.

Upon the next page we present a map which will serve to make clear the situation which developed the necessity for the inauguration of the reshipping practice at Nashville more than forty years ago, and long before the Act to Regulate Commerce was passed.


CHICAGO
ST. LOUIS
WABASH RIVER
VINCENNES
EVANSVILLE
HENDERSON
CAIRO
PADUCAH
MISSISSIPPI RIVER
OHIO RIVER
CINCINNATI
LOUISVILLE
PARKERSBURG
PITTSBURG
HICKMAN
N&C
N&C
JOHNSONVILLE
CUMBERLAND RIVER
L&N
NASHVILLE
N&C
L&N
MEMPHIS
CHATTANOOGA
TENNESSEE RIVER
DECATUR
N&C
L&N
ATLANTA
AUGUSTA
BIRMINGHAM
L&N
OPELIKA
MONTGOMERY
SELMA
EUFAULA

The Commerce Court found:

"The undisputed facts which gave rise to the establishment of the reshipping privilege at Nashville by the N., C. & St. L. in 1872 and by the L. & N. in 1877 are substantially as follows:

"Nashville is located on the Cumberland River about 190 miles above its confluence with the Ohio River, and the Cumberland is navigable below Nashville for about nine months in the year. The navigable season corresponds with the season for the handling of grain crops. Atlanta is located 289 miles southeast of Nashville, and none of the Georgia points mentioned in the order of the Commission are on any navigable stream connecting them with the Mississippi, Ohio or Cumberland Rivers. Before there were any rail connections between Nashville and the river gateways, such as Cincinnati, Louisville, Evansville, Paducah, Cairo, Hickman, etc., and before there was even any rail connection between any of these river crossings and Atlanta and the Southeast, the Nashville & Chattanooga Railroad was completed from Nashville to Chattanooga as early as 1854. The cities of Charleston and Savannah contributed largely to the completion of this road and its connections with Atlanta and the seaboard for the purpose, expressed at the time, of connecting the cotton-producing section of the country with the grain fields of the West. The line from Charleston to Atlanta and Nashville was the first line and was and still is the shortest line from the Southeast to the Western grain country, and was completed before there was any other rail connection between Nashville and the Southeast on the one hand and Cairo, Evansville, Louisville or Cincinnati on the other. The Nashville & Chattanooga Railroad, as soon as it was completed to Nashville, was the means by which grain and all Western commodities were sent into the Southeast. All this traffic of necessity came from the Wabash, Ohio and Mississippi Rivers and up the Cumberland River by steamboat to Nashville, and was there loaded upon the cars of the Nashville & Chattanooga Railroad, the only rail line into the Southeast at that time.

"This movement of grain caused Nashville at that early day to become the concentration point for grain moving through Nashville as the first rail gateway, and over the Nashville & Chattanooga Railroad as the first rail line into the Southeast having direct connections with the Western waterways. Vast amounts of grain and other commodities were gathered in this way at Nashville by the boats of the Cumberland River, and transshipped by this first rail line to Atlanta and other points in Southeastern territory. This was long before Cincinnati, Louisville, Cairo or Paducah, or any of the other river crossings were grain gateways or concentration points for this trade. There were no rail connections north or west of Nashville until the L. & N. finished its lines between Louisville and Nashville in 1859.

"At this time the L. & N. Railroad did not extend south of Nashville, and that road did not acquire any line south of Nashville until it leased the road from Nashville to Decatur in 1871, and completed the same to Montgomery in 1879. The Nashville

& Chattanooga Railroad did not own a line west and north of Nashville until 1872, when it began to operate 171 miles of railroad running from Nashville west, crossing the Tennessee River at Johnsonville, Tenn., and going to the Mississippi River at Hickman, Ky. This road then became interested in the hauling of grain and other commodities all the way from the Mississippi and Ohio Rivers on the west to Atlanta and Southeastern territory. Prior to that time the Nashville & Chattanooga Railroad had no interest in how the grain came to Nashville from the Mississippi and Ohio Rivers.

"After the Nashville & Chattanooga Railroad became the owner of the line of road from Hickman to Nashville it constructed and put in operation free elevators on the Tennessee River at Johnsonville and on the Mississippi River at Hickman, and by so doing sought to attract shipments of grain moving from the Mississippi and Ohio Rivers to its 171-mile haul to Nashville, and then to carry it to the Southeast. It was found, however, that notwithstanding the establishment of the free elevators at the points indicated, most of the grain from the Wabash, Mississippi, Ohio and Cumberland River Valleys continued to come into Nashville by boat on the Cumberland River. The boat and rail rate from the Wabash, Ohio and Mississippi River grain-producing valleys, via Hickman and Johnsonville, to Nashville, was higher than the all-river rate accepted by the boats upon grain from these grain sections up to Nashville. The N., C. & St. L. Railroad was therefore obliged to take some steps to meet this situation in order to protect its railroad running from Nashville west, and to procure the longest possible haul from the grain-producing sections aforesaid to the grain-consuming territory in the Southeast.

"The N., C. & St. L. Railroad could have done this in either one of two ways. It could have fixed and accepted a very low local rate from the river crossings up to Nashville, thus meeting the steamboat competition; or it could have established a through rate from the river crossings to the Southeast via Nashville, protecting this through rate by extending the privilege of reshipping at Nashville. It chose to follow the latter course in order better to subserve and protect its revenues. A very low local rate up to Nashville would have unnecessarily sacrificed revenue. This low rate would have been applicable to all the grain locally consumed at Nashville or points based on Nashville, and if the road had unduly reduced the local rate up to Nashville to meet the steamboat competition it would have been impossible to maintain the existing scale of rates on other commodities besides grain which were going to Nashville in large quantities for local consumption. This was the origin of the reshipping privilege which has existed for forty years at Nashville. It was caused by competition in the shipment of grain from the Mississippi and Ohio Rivers by boat to Nashville on the Cumberland River.

"The Cumberland River still exists, and Nashville is still located upon it. For all practical purposes, the situation, so far as competition on the

Cumberland River is concerned, is the same potentially as it was in 1872. We must not deceive ourselves by believing that the L. & N. and N., C. & St. L. extended this reshipping privilege to shippers and dealers at Nashville as a favor to the shippers and dealers or as a favor to Nashville. The simple truth is that the railroads extended the privilege to these shippers and dealers so as to obtain the shipment of grain from Mississippi and Ohio River crossings over their own lines."

Trans., pp. 1103-1106.

By the undisputed facts and evidence before the Commission the reshipping practice condemned by the Commission and ordered stopped at Nashville, as an alleged "undue" and "unlawful" discrimination against the complaining Georgia points, has been for more than forty years, and is now, as follows and only as follows, to wit:

On grain, grain products and hay shipped to Nashville by rail from or through Ohio and Mississippi River crossing points (Louisville, Evansville, Hickman, Paducah, Cairo, etc.), the full local rate from said crossing points to Nashville is paid; and these shipments may then be stopped at Nashville for a period of not exceeding six months, during which they may be rebilled and reshipped to destinations in Southeastern and Carolina territory; and on such shipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi River crossing point via Nashville to any given destination in said territory, shall exactly correspond with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi River crossing point to its final destination, without having been stopped in transit at Nashville at all.

For example, the local rate on said commodities from said river crossing points to Nashville is ten cents per 100 pounds; the rate from Nashville to Atlanta on said commodities is seventeen cents per 100 pounds. The through rate from said river crossing points to Atlanta is twenty-four cents per 100 pounds, or three cents less than the sum of the local rate from the river crossing point into Nashville and the local rate out of Nashville to Atlanta. Under said reshipping practice at Nashville the through rate of twenty-four cents is there protected by the rail carriers on said shipments, although it may have been stopped in transit at Nashville as above shown. The full local rate of ten cents having been paid the rail carriers at the time the shipment into Nashville occurred, a readjustment of the total transportation charge is made when the shipment out occurs, so that the shipper ultimately pays upon said commodities reshipped at Nashville the through rate instead of the combination of local rates into and out of Nashville on said shipment. In just the same way the through rate from the Ohio or Mississippi River crossing points is, by said reshipping practice, protected at Nashville on said shipments when rebilled out of Nashville to other points in Southeastern and Carolina territory to which through rates from said river crossing points are in effect.

Testimony of C. B. Compton, Trans., pp. 589, 590; 613, 615; 930, 931.
16 I. C. C. Rep., 595, 596.

That the above is a correct statement of just what the ancient reshipping practice at Nashville *has always been*, and *is now*, and just how this reshipping practice *is applied*, was not the subject of any dispute or controversy before the Commission at all.

Testimony of Chas. Barham, Trans., pp. 381, 382; C. B. Compton, pp. 417, 431, 432.

It should be added, however, that between the first and second hearings before the Interstate Commerce Commission, reshipping at Nashville upon grain, grain products and hay coming through the Memphis gateway was discontinued, and is now discontinued; because of the idea contained in the Commission's first report that to permit reshipping at Nashville upon grain moving there through the Memphis gateway presented a possible opportunity for improper practices.

Trans., pp. 433, 624;
21 I. C. C. Rep., 188.

And admittedly there has not been any reshipping practice at Nashville with reference to grain coming there through the Cincinnati gateway for several years, or since the Louisville & Nashville Railroad constructed its own short line from Cincinnati to Atlanta, known as the Louisville & Nashville, Cincinnati-Atlanta Line.

Trans., p. 433.

Admittedly, now, the method of reshipping at Nashville is that the full local rate of 10 cents from the Ohio River to Nashville is paid when the shipment into Nashville occurs; and thereafter the grain is reshipped at the *balance* of the through rate from the Ohio River to Southeastern destinations.

Trans., pp. 381, 382.

While the circulars and tariffs of the rail lines at Nashville defining the reshipping practice there have been renewed and brought down to date from time to time, and made to conform to suggestions and rulings of the Interstate Commerce Commission upon the general subject of transit privileges, the reshipping practice at Nashville, in *principle* and *effect*, has never been changed. This will not be made the subject of any denial at all.

Trans., p. 432.

The undisputed testimony lawfully developed at the hearings before the Interstate Commerce Commission showed that the reshipping practice has existed at Nashville ever since its first inauguration there by the Nashville & Chattanooga road in 1872, and that it has continued to exist there for the same reason that compelled and constrained its first inauguration at Nashville. When the Louisville & Nashville Railroad acquired its lines south of Nashville, it, like the Nashville & Chattanooga Railroad, became interested in the same way in obtaining the longest possible haul of the grain from the Northwest to the Southeast. It, like the Nashville & Chattanooga Railroad, could have met the steamboat competition on the Cumberland River in either of two ways, by accepting a very low local rate between the river crossings and Nashville, or by protecting its through rate by the installation of reshipping at Nashville. For the same reasons that constrained the Nashville & Chattanooga to follow the latter course, the Louisville & Nashville Railroad followed the same course, and put in effect the reshipping practice in about 1877. *The same river competition and compelling conditions which constrained the inauguration of the reshipping practice at Nashville are still present today, and for this reason the reshipping practice has been continued at Nashville.*

Testimony of C. B. Compton, Trans., pp. 589-593, 810-815; E. B. Stahlman, pp. 707-709.

By the undisputed proof before the Commission, the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway do not extend any reshipping privileges on grain at any other point at all in the Southeast, and neither of these lines would continue to extend this practice at Nashville if they were not constrained to do so by the continuance of the river competition there. These carriers did not in the beginning permit, and have never permitted, the reshipping practice at Nashville for the purpose of building up the Nashville market. The Nashville market was present on the Cumberland River, and these reshipping practices were inaugurated, and have been continued, to meet ever-present river competitive conditions; and the proof before the Commission was clear and undisputed on the proposition that there is no river competition and no similar competitive conditions at Atlanta and the complaining Southeastern points.

> Testimony of E. B. Shahlman, Trans., pp. 702-706, 710-713; Chas. Barham, pp. 780-783, 842, 843; C. B. Compton, pp. 810, 811, 812-815, 823, 824, 829, 830; R. H. McClelland, pp. 722-725; H. H. Hughes, pp. 741, 742; E. M. Kelley, pp. 732, 733; Jno. H. Bell, pp. 753, 754, 756-758, 762.

The undisputed evidence developed at the hearings before the Commission showed that the only effect of the abolition of the reshipping practice at Nashville would be to deflect and divert the traffic between the Ohio and Mississippi River crossing points and the Southeast to the boat lines on Cumberland River, and to other rail lines than those running via Nashville, and would in no way benefit the complaining Georgia points.

After the completion of the Nashville & Chattanooga Railroad between Nashville and Chattanooga, in 1854, there were, from then up until the completion of rail lines north and west of Nashville, and the inauguration of the reshipping practice at Nashville, very many more boat lines and very much more steamboat competition on the Cumberland River than there have been since that time. The inauguration of the reshipping practice at Nashville about 1872, and its continuance since that time, has operated to obtain for the rail lines north and west of Nashville, as against steamboats in the Cumberland River, by far the larger part of the through grain traffic which moves in via Nashville to the Southeast on through rates from or through the Ohio River crossings, with the stoppage in transit privilege at Nashville.

> Testimony of E. B. Stahlman, Trans., pp. 698, 702, 704; Chas. Barham, pp. 781, 782, 793; C. B. Compton, pp. 809, 812, 815.

The steamboats on the Cumberland River, however, continue to bring considerable grain into Nashville, and some of this grain so brought in by the boats is handled through the "River and Rail Elevator," and by the boats unloading directly into the cars at the Tennessee Central incline on the river bank. The United States Engineer's report shows that *in 1908* there was *19,031 tons of grain* brought by the Cumberland River to Nashville by steamboats, and that in 1907 there was *32,640 tons of grain* so brought by the Cumberland River to Nashville by boat.

> Testimony of T. M. Gallagher, Trans., p. 773.

The rail lines, *by the maintenance of the reshipping arrangements* at Nashville, attract, as above stated, by far the larger part of the grain moving into Nashville from the Ohio River crossings, and reshipped thence to the Southeast, and for this reason the number of boats available in the Cumberland River has materially decreased since 1872, though there were still thirty-three boats in this trade during the year last before the hearing by the Commission.

There were at the time of the hearing before the Commission three regular packet lines on the Cumberland River: the *Ryman Line* owns five boats, the steamers Electra, J. B. Richardson, Bob Dudley, Henry Harley and R. Dunbar; the *Tyner Line* owns the steamer Gracey Childers, 250 tons; and the *Rhea Line* owns one steamer with a tonnage of 325 tons.

These packet lines actively participate in the transportation of grain from Ohio River points to Nashville. They have two barges, one of a capacity of 10,000 sacks and the other of a capacity of 15,000 sacks, which would approximately be 35,000 bushels in one tow. The total tonnage of these tows and boats regularly available on the Cumberland River at the time of the hearing before the Commission aggregated 2,375 tons, and these boats and tows make from one to two trips a week, practically making a boat every day. There was, at the time of the hearing before the Commission, available in the Cumberland River, between Ohio River points and Nashville, a weekly tonnage of 173,750 bushels, if these boats made only one trip a week.

Testimony of T. M. Gallagher, Trans., pp. 665-667.

In heavy grain seasons, transient boats and tows are brought into the Cumberland River and enter actively into carrying grain from Ohio, Wabash and Mississippi River Valleys to Nashville.

Testimony of T. M. Gallagher, Trans., pp. 772, 773.

The steamboat rate in the past, from 1870 up until the time of the hearing before the Commission, it was proved, had varied from 3½ cents per 100 pounds (5 cents per bag of 145 pounds), to 9 cents per 100 pounds; and even with the present equipment in the Cumberland River in the way of packet boats and barges, which is not modern equipment at all, grain could be, and has been, brought to Nashville from Ohio River crossings at 6 cents per 100 pounds, *including the cost of loading and unloading*, and the steamboats have made a profit in so doing.

Testimony of T. M. Gallagher, Trans., pp. 771, 772.

It was also proven before the Commission without dispute that if the reshipping practice at Nashville were withdrawn and the present 10-cent rail rate from Ohio River crossings into Nashville were charged by the rail lines, the available steamboat tonnage in the Cumberland River would treble at once, and it was proved that a company would be organized in *fifteen days* to bring grain into Nashville with *present equipment*, at 6 cents per 100 pounds, including cost of loading and unloading from cars to boats and from boats to cars.

Testimony of T. M. Gallagher, Trans., pp. 667, 772.

It was likewise proven, without contradiction, that with present equipment, steamboats on the Cumberland River could make a lower rate than 7 cents per 100 pounds for bringing grain from the Ohio River crossings into Nashville, if the movement of this grain were concentrated on the boat lines; and that even an 8-cent or 9-cent differential in the rail rate at Nashville under the Ohio River would induce additional boats to enter the river and compete for this large through grain traffic.

Testimony of C. B. Compton, Trans., pp. 814, 815, 821-823, 832, 833.

In other words, with present equipment in the Cumberland River, grain could be profitably brought from the Ohio River crossings to Nashville for 6 cents per 100 pounds by steamboat, including the cost of loading at the Ohio River from cars to boats, and loading at Nashville from boats to cars, and this grain could then pay the present full local rate from Nashville out, to any and all points in Southeastern territory, and the total transportation charge would not exceed the present through all-rail rates between the Ohio River and the Southeast applied at Nashville by the rail carriers through the means of the reshipping practice.

In other words, by boat from the Ohio River to Nashville and by rail from Nashville out to Southeastern destinations, on the basis of a profitable boat rate and the present full local rail rate from Nashville to Southeastern destination, the grain dealers at Nashville could, without the reshipping practice, draw their grain from Ohio River crossings to Nashville, and reship the same from Nashville out to the Southeast, at a total transportation charge not exceeding the present through all-rail rates from the Ohio River to Southeastern destinations, available to the dealers at Nashville through the means of the reshipping practice there extended by the rail lines.

> Testimony of C. B. Compton, Trans., pp. 815, 818, 823, 828-834; John H. Bell, pp. 753, 754, 761-763; E. M. Kelley, pp. 733, 734; H. H. Hughes, pp. 741, 750, 751, 758; R. H. McClelland, pp. 723, 724; J. H. Wilkes, pp. 845, 846; S. S. Kerr, pp. 849, 850; George Doubleday, p. 852.

It was admittedly, without any sort of contradiction, proved before the Interstate Commerce Commission that some grain, and a *substantial tonnage* of grain, actually now does move into Nashville by boat from the *Ohio, Mississippi Wabash* and *Cumberland* Rivers, and is then shipped at the full local rate out to the Southeast in competition with the all-rail through rate protected at Nashville by the reshipping privilege—one witness proving that during the months of July and August he had brought 65,000 bushels of wheat from Mississippi River landings all the way to Nashville by boat; and between March 1st and the time of the hearing before the Commission in the following September this witness had brought 100,000 bushels of grain from Ohio River landings all the way to Nashville by boat.

> Testimony of E. M. Kelley, Trans., p. 732; S. S. Kerr, pp. 849, 850; T. M. Gallagher, pp. 776, 777.

The rail lines are more expeditious and certain than steamboat lines, between the Ohio River and

Nashville, and this attracts business to the rail lines; but it is the reshipping practice at Nashville, protecting the through rate from the Ohio River into the Southeast, and thus leaving such a small margin for the boats on the through business, which is the bulk of the business, that enables the rail lines to successfully meet the steamboat competition and obtain most of the traffic.

Testimony of C. B. Compton, Trans., pp. 812-815, 781, 782.

All the rail lines at Nashville now run, and for years have run, to the river's brink, and through a river and rail elevator, or by means of an inclined track, it is possible to load grain, and grain is actually loaded, directly from boats to cars.

Testimony of E. B. Stahlman, photograph, Ex. No. 4, Trans., pp. 700, 701.

Now, it also was clearly proven before the Interstate Commerce Commission, without any dispute or contradiction, that with *modern equipment*, in the way of tow boats and barges, and present well-known appliances for the elimination of labor in loading from boats to cars, grain could be brought in bulk from the Ohio River crossings to Nashville at from 3 cents to 4 cents per 100 pounds, including the cost of loading and unloading at the Ohio River and at Nashville. We say this was *definitely* and *positively* proven before the Commission without any sort of dispute or *contradiction*.

Testimony of R. H. McClelland, Trans., p. 723; H. H. Hughes, pp. 741-743; E. M. Kelley, pp. 733, 734; John H. Bell, pp. 752, 753.

And the proof was *undoubted* and *uncontradicted* before the Commission that this modern equipment would already have been put in the river to bring grain from the Ohio River crossings to Nashville at this reduced rate of from 3 cents to 4 cents per 100 pounds, if it had not been deemed certain that the railroads would at once, by a reduction and equalization of their rates, meet the cheap boat rate, bankrupt the boat lines, and render valueless the additional investment necessary to put these modern handling facilities in the river.

> Testimony of E. M. Kelley, Trans., p. 733; H. H. Hughes, pp. 741, 742, 748; John H. Bell, p. 754.

And the proof was also *undoubted* and *uncontradicted* that if reshipping were abolished, and the rail lines did not readjust their rail rates at Nashville in such a way as to equalize Nashville dealers with the Ohio River crossing markets, these modern handling facilities *would be put in the river*, and this cheap boat rate be thus constructed from the Ohio River crossings to Nashville.

> Testimony of R. H. McClelland, Trans., p. 723; E. M. Kelley, pp. 733, 734; H. H. Hughes, pp. 741-743; John H. Bell, pp. 752, 753.

If reshipping were abolished at Nashville and the rail lines there did not readjust their rates so as to equalize Nashville dealers with the Ohio River crossings in reaching Southeastern destinations, the grain men at Nashville would either have to quit business or reorganize on this river basis for the inbound movement of the grain to Nashville from the Ohio River.

> Testimony of E. M. Kelley, Trans., p. 731; R. H. McClelland, p. 722; H. H. Hughes, p. 743; John H. Bell, pp. 752, 753.

It was proven without any sort of *dispute* before the Commission that after the grain dealers at Nashville had sacrificed their existing investments in handling facilities now located exclusively upon the rail lines, and had made large new investments necessary to a reorganization of their business on a purely river basis for the inbound movement of the grain to Nashville from the Ohio River, the Nashville grain dealers could do business with the Southeast by bringing their grain into Nashville entirely by river, and by shipping it out by rail, and paying the present full local rates out into the Southeast; and thus get advantage of the same total transportation charges they now can avail themselves of, by reason of the reshipping practice at Nashville, protecting the through rates from the Ohio River. And in the meantime, while all this expensive reorganization was being worked out at Nashville, at an enormous loss to the grain market and the rail lines there, the Mississippi and Ohio River crossing points, which have the reshipping practice protecting their through rates on grain shipments from the West and Northwest into the Southeast, would be doing the business in the Southeast which the Nashville market is now enabled to do, and Atlanta and the other interior jobbing points in Georgia would not, and could not, be benefited to the slightest degree.

> Testimony of John H. Bell, Trans., pp. 752-754, 761, 762; H. H. Hughes, pp. 741, 742, 750; R. H. McClelland, pp. 723, 724; E. M. Kelley, pp. 731-734; C. B. Compton, pp. 815, 820, 823, 826, 834.

So we say that it appeared by a great mass of testimony, and *without any sort of dispute*, before the Interstate Commerce Commission, that the abolition of the reshipping practice at Nashville could only have the effect, so far as the inbound movement of grain from the Ohio River to Nashville is concerned, of deflecting this traffic to steamboat lines, which, as we have seen, even now, with present equipment, compete for and carry a substantial amount of this traffic, and could easily carry the great bulk of it.

Our adversaries insisted before the Commission, and at the argument of this case in the Commerce Court, that if the reshipping practice were abolished at Nashville, and the Nashville grain dealers, by means of boat lines, constructed a very cheap boat rate from the Ohio River up to Nashville, for one link in the through movement of the grain into the Southeast, this cheap boat rate, added to the present rail rates out of Nashville to Southeastern destinations, would cut and reduce the all-rail through rate from the Ohio River to Atlanta and Southeastern destinations; and thus the complaining Georgia points and the entire Southeast would be benefited by cheaper rates from the Ohio River to all the Southeast. We think this is undoubtedly true.

But in this connection it is only necessary to remind the Court that there is no attack upon the *reasonableness* of the existing through rail rate from the Ohio River to the Southeast, either via Nashville or by other rail routes and lines which do not run via Nashville. On the other hand, the undisputed testimony before the Commission was, as we have seen, that all these rail rates are *reasonable* rates. If, by large investments in handling facilities on the river front, and additional or modern water craft upon the Cumberland River, the grain dealers of Nashville were to construct this very cheap boat rate from the Ohio River to Nashville, bring in their grain by boat, and ship it out over the rails to Southeastern destinations at a total transportation charge less than the existing through (*reasonable*) all-rail rates from the Ohio River into the Southeast, it is obviously true that the rail lines running from the Ohio River crossings via Nashville to the Southeast, and all the other rail lines running from the Ohio River crossings to the Southeast, by routes other than via Nashville, would be compelled to, and would, at once equalize with the cheap boat and rail rate which had been constructed via Nashville; and this would leave the complaining Georgia points and Nashville in exactly the same *relative* positions which they now occupy.

And the Nashville grain dealers would, after their large investments, be in the same position they are now—that is, merely equalized with their competitors at the Ohio River crossings; and the only result would be the cutting of all existing rail rates from the Ohio River into the Southeast; and this is just what the rail lines, under the *law, have the right to avoid*—so long as the *existing* rail rates available to the Southeast are *reasonable rates*, as they are, *admittedly* and *without contradiction*, shown to be in the case at bar; and the *alternative* order of the Commission is, under the law, *an absolute finding* that all these existing rates *are reasonable*.

By the undisputed evidence introduced at the hearings before the Commission, it was developed that while the reshipping practice at Nashville was originally begun and has been since continued for the *sole* and *only purpose* of meeting boat competition on the Cumberland River, it has *since transpired* that all of the Ohio River crossing points have come to have rail connection with the Southeast by lines other than those that run via Nashville, and have come to have the reshipping practice; and that these Ohio River crossing points, if the reshipping practice at Nashville were abolished, could and would still ship grain to the Southeast exactly as they do now. And if reshipping were abolished at Nashville the only result would be to throw Nashville's trade in the Southeast back to these river crossings; and this would result in deflecting the movement of the grain which now moves via Nashville to other routes and lines running between Mississippi and Ohio River crossing points and the Southeast. In other words, there is only a certain amount of grain moving each season from the West to the Southeast. The withdrawal of the reshipping practice at Nashville would not increase this movement, and neither would it decrease it; it would simply divert the grain now moving into the Southeast via Nashville, and cause the same to move directly from the river crossings to the Southeast without stopping at Nashville, or without moving via Nashville at all, until a reorganization of the grain business at Nashville on a river basis for the inbound movement from the Ohio River was effected.

Testimony C. B. Compton, Trans., p. 823.

Admittedly, by the rate adjustment at the Ohio River, and reshipping practices at all of the Ohio River crossings, all these crossings are, with respect to their rates, equalized with each other, so that every Ohio River crossing can draw grain from the West and Northwest, stop the same in transit, and subsequently forward it to Southeastern destinations, on terms of equality with every other Ohio River crossing; and all that the reshipping practice does at Nashville is to equalize Nashville with these river crossings which acquired their rail connection with the Southeast long after Nashville did, and acquired the reshipping practice long after Nashville did.

Testimony C. B. Compton, Trans., pp. 827-829.

At each of these Ohio and Mississippi River crossings there are, besides the rail lines serving the Nashville market, other competing rail lines leading from these river crossings to the Southeast, whose rates to the Southeast on grain are equalized with the rates of the rail lines running via Nashville. And if reshipping at Nashville were abolished and Nashville's trade in the Southeast thrown back to the Ohio River crossings, the rail lines at Nashville would either be compelled to surrender the inbound traffic from the Ohio River to Nashville to the boat lines, or there would be a deflection or diversion of the traffic now being handled through Nashville, and the same would be shipped direct from the various Ohio and Mississippi River crossings, where this traffic would be divided up among various competing lines leading from these crossings to the Southeast.

Testimony C. B. Compton, Trans., p. 830.

In other words, abolishing the reshipping practice at Nashville would but distribute the grain traffic now moving via Nashville with the stoppage in transit privilege there, to either boat lines for the inbound movement from the Ohio River to Nashville, or, at all events, a large portion of the traffic would be diverted to other Western markets located on, and north and west of, the Ohio and Mississippi Rivers, where it would be divided up among the various competing lines leading from those points to the Southeast—thus depriving the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, of the carriage heretofore enjoyed by them of grain from the Western points of origin to Nashville, and from Nashville to the Southeastern territory, and of the revenues heretofore received for such transportation, without benefiting the competing points at all.

Testimony C. B. Compton, Trans., pp. 833, 834.

As demonstrating the enormous property loss that would result in the way of the destruction of existing handling facilities at Nashville, without in any way benefiting the complaining Georgia points, if reshipping at Nashville were abolished, the following facts were shown without dispute at the hearing before the Commission:

After the completion of the Nashville & Chattanooga Railroad, and before the inauguration of the reshipping practice at Nashville, all of the handling facilities in the way of elevators and warehouses for grain at Nashville were located *on the banks* of the Cumberland River.

Testimony Chas. Barham, Trans., p. 782.

For the last forty years, while these reshipping practices have, for all the reasons before indicated, been continuously extended by carriers serving the Nashville grain market, it has resulted that, upon the faith of these transit practices, almost all of the handling facilities for grain in the form of elevators, warehouses and mills, have located themselves *away from the river*, and exclusively on the rail lines, though, as we have seen, there are some few located on both river and rail.

Testimony Chas. Barham, Trans., p. 782.

If the reshipping practice were destroyed at Nashville, and the full local rate in and out had to be paid, the grain business at Nashville, as at present organized, would be driven out of existence. It is this ancient reshipping practice which equalizes, as we have seen, the Nashville market with the Mississippi and Ohio River crossings, at all of which reshipping has come to be established long after it was established at Nashville, for the sole purpose of meeting Cumberland River competition. And the Nashville dealers obviously could not pay the full local in and out in reaching the Southeastern markets, while these Mississippi and Ohio River crossings could reach the same points in the Southeast on a through rate that would in all cases be at least 3 cents below the combination of the locals on Nashville.

The result would be that large and extensive elevators, warehouses and handling facilities located exclusively on the rail lines at Nashville, and within an area of ten square miles, would be rendered useless for the purposes for which they were constructed. The grain dealers at Nashville would be driven from the field so far as through business with the Southeast, which is the great bulk of their business, is concerned.

To give the Court a correct idea of the grain business at Nashville, and the resulting loss and confiscation of values if the reshipping privilege at Nashville were withdrawn, a tabulated statement was carefully prepared with respect to these investments and values. The sum of $1,566,000 is invested in warehouses, elevators and handling facilities in Nashville, and $1,500,000 of these investments are located exclusively upon the rail lines.

These warehouses and elevators have a capacity of 3,632,000 bushels. There are sacking facilities in these elevators and warehouses of a capacity of 252,000 bushels per day. The volume of the grain business in Nashville for the year 1909 was 36,915,000 bushels, or, stated in dollars, this volume of business amounted $23,038,012.63.

In addition to the above warehouses, elevators and handling facilities, there are located in Nashville mills of a combined capacity of 6,500 barrels per day. These mills do an average business of 4,837,500 bushels per annum. They have elevators and warehouses used in connection with their milling plants, and located exclusively upon rail lines, of the value of $294,000. The investments in the mills located exclusively upon rail lines, and excluding the investments in elevators and warehouses used in connection with the mills, are $508,000. The volume of business done by these mills for the year 1909 amounted to the sum of $5,935,000.

Testimony John H. Bell, Trans., pp. 758, 759; H. H. Hughes, pp. 740, 741.

As illustrating the proportion that the through business bears to the local business at Nashville, one of the largest grain concerns at Nashville last year did a local business of $300,000, and a through shipping business of $3,500,000.

Testimony H. H. Hughes, Trans., p. 741.

Now, it is undoubtedly true that if the reshipping practice at Nashville were withdrawn, and the full local rate in and out of Nashville had to be paid on the through business, all of these enormously valuable handling facilities located exclusively upon the rail lines would become valueless as such, so far as handling the through business is concerned.

It is *undoubtedly true* that after a lapse of time and a suspension of business which would result in great loss, and make necessary large investments in handling facilities located on the *river*, the grain business at Nashville could be rebuilt and reorganized from the ground up *on a purely river basis for the inbound movement.* Enormous loss and confiscation of values would be entailed in working out this reorganization.

After it was done, and the great loss had been suffered, Nashville dealers could do business with the Southeast by bringing their grain into Nashville entirely by river and by shipping it out over the rails into the Southeast, *and paying the present local rates* out. And in the meantime, while all this reorganization was being worked out at Nashville, at an enormous loss to the grain market there, the Mississippi and Ohio River gateways, which have the reshipping practice, protecting the through rate on grain shipments to the Southeast, would be doing the business in the Southeast that the Nashville market is now enabled to do, and Atlanta and the other interior jobbing points in Georgia would not be benefited to the slightest degree.

> Testimony John H. Bell, Trans., pp. 752-754; H. H. Hughes, pp. 741, 742, 750; R. H. McClelland, pp. 723, 724; E. M. Kelley, pp. 731-734; C. B. Compton, pp. 815, 820-823, 826-834.

With reference to all the *fruitless* and *unnecessary* sacrifice of property at Nashville which would follow the abolition there of the reshipping practice, there was not any dispute or conflict at all in the evidence before the Commission.

The undisputed facts before the Commission showed, as we have seen, that in 1854, prior to the time when any of the Ohio River crossings had any connections at all with the Southeast, Nashville, by the completion of the Nashville & Chattanooga Railroad between Chattanooga and Nashville, became the first rail gateway and storage point for grain brought to Nashville by boats on the Cumberland River and shipped out to the Southeast over said railroad, and that, since 1872, the reshipping practice on grain moving by rail from Mississippi and Ohio River crossings to Nashville has been in force, at Nashville, as a device to meet Cumberland River competition. *Since* 1872, the various Ohio River crossing points have themselves acquired rail connections with the Southeast, have become storage points for grain, and have come to have reshipping practices on grain, exactly as Nashville had long before them. And the *undisputed* evidence developed at the hearings before the Commission was that, with respect to river and rail competition, Nashville is now exactly similarly circumstanced with these Ohio River crossings. The same steamboats can ply between all these river crossings and Nashville, bringing the grain from the rich grain valleys of the Mississippi, Ohio and Wabash Rivers to either them or to Nashville. These Ohio River crossings have simply grown to be what Nashville was long before them—storage points for grain, where the reshipping practice is in force.

It would now be *artificial, unnatural* and *discriminatory against* Nashville to deprive it of the reshipping practice and destroy it as a concentration market, and leave these Mississippi and Ohio River crossings in possession of such transit privileges.

> Testimony Chas. Barham, Trans., pp. 795-798; C. B. Compton, pp. 589-591, 810-815, 820-823, 826-834; E. B. Stahlman, pp. 704-706, 713, 716, 717, 720.

And as demonstrating that Nashville is in exactly the same class with these Mississippi and Ohio River crossings, and not in the same class with Atlanta and the other complaining interior jobbing points in Georgia, it was shown by the undisputed testimony developed at the hearings before the Commission that if reshipping were taken from Nashville it would not benefit Atlanta and the other Georgia points named, and the *only effect* it would have, in addition to deflecting the traffic to the boat lines, would be to distribute Nashville's trade among the Mississippi and Ohio River gateways, which would administer upon the business of the defunct Nashville market, because they would still, with their transit privileges protecting their through rates to the Southeast, enter Atlanta and contiguous Georgia territory exactly as they do, and as Nashville does, now.

> Testimony C. B. Compton, Trans., pp. 589, 590, 597, 809-815, 820-823, 826-834; John H. Bell, pp. 751-756, 762-764; E. M. Kelley, pp. 731-733; H. H. Hughes, p. 750.

All of the foregoing facts which we have so burdened the Court by stating with such detail, were made to appear by the undisputed testimony developed at the hearings before the Commission, and all of these undisputed facts are, in our view, necessary to be understood by the Court in order to grasp, in their proper bearings, fragments of the testimony before the Commission quoted and cited by our adversaries.

B.

The Law Applied to the Undisputed Facts Developed Before the Interstate Commerce Commission, Establishes that the Commission Exceeded its Power in Condemning the Ancient Reshipping Practice at Nashville as an "Undue" Discrimination Against the Complaining Georgia Points.

It does not matter what may be the view or the finding of the Commission with respect to a supposed similarity, in some respects, of circumstances and conditions prevailing at Nashville, as compared with the Georgia points in question; because, *as soon* as it appeared, by the *uncontradicted* facts before the Commission, that the reshipping practice extended by the rail carriers at Nashville was there *begun* and *continued*, not *voluntarily* by the carriers, but *involuntarily*, and for the purpose of meeting and reckoning with competitive river conditions not existing at the complaining Georgia points—and as soon as it appeared by the *uncontradicted* facts before the

Commission that abolishing the reshipping practice at Nashville would have no effect except to divert the traffic in question between the destinations in question to steamboats, and to rail routes and rail lines other than those serving the Nashville market, while Nashville and the complaining Georgia points would be left (if reshipping at Nashville were abolished) in the same relative positions that they now are, with the reshipping practice in force at Nashville—it *resulted* that the reshipping practice at Nashville was *no violation* of the Act to Regulate Commerce, and, therefore, *beyond the power* of the Commission to condemn and order stopped.

This is so, because this Court has *repeatedly held* that the existence of such *controlling competitive conditions*, and the fact that striking down the alleged discrimination would but *divert the traffic*, and not relieve the relative position of the complaining point, as compared with the point complained against—*of themselves* and as "matter of law" operate to make the alleged discrimination not "undue," and consequently not in violation of law. The existence of these *determinative facts*, without any sort of contradiction before the Commission, "*leaves no room*" for the Commission to hold that the seeming discrimination at Nashville is any violation of law; and if the Commission has condemned the reshipping practice at Nashville when it is no violation of the Act to Regulate Commerce, it, of course, results that the Commission has exceeded its powers, and that the decree of the Commerce Court is to be affirmed.

We will now, for convenience, briefly quote some of the decisions announcing the rule above set forth.

In the case of ***Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.***, the Supreme Court of the United States, speaking through *Mr. Justice Brown*, said:

> "It is not all discriminations and preferences that fall within the inhibition of the statute; only such as are *unjust* and *unreasonable*. . . . Indeed, the possibility of *just* discriminations and *reasonable* preferences, is recognized by these sections in declaring what shall be deemed unjust."
> 145 U. S., 276, 277.

And again, in the case of ***E. T., V. & G. Ry. Co.* v. *Interstate Commerce Commission***, 181 U. S., 18, 19, the Court, speaking through the present Chief Justice, in a case involving Nashville's favorable location upon the Cumberland River and the resulting competitive situation thereby existing at Nashville, thus explained the *Third Section* of the Act to Regulate Commerce:

> "In a supposed case, when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it

must result that a *discrimination springing alone* from a disparity in rates cannot be held, *in legal effect*, to be the *voluntary* act of the defendant carriers, and as a consequence the provisions of the *third section* of the act forbidding the *making or giving* of an *undue* or *unreasonable* preference or advantage *will not apply*. The prohibition of the *third section*, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary and wrongful* act of the carriers complained of as having given undue preference, *and does not relate to acts wholly beyond the control of such carriers*." . . . .

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of the court; that is, that competition which is *real and substantial*, and exercises a *potential influence* on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and *justifies* the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may *seemingly* give a preference to that point, and the greater rate to the non-competitive point may *apparently* engender a discrimination against it. We say *seemingly* on the one hand and *apparently* on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' "

181 U. S., 18, 19.

And in the same case, this Court, in dealing with the different circumstances prevailing at Nashville, as compared with Chattanooga, which would justify the rail lines in charging a less rate from the East to Nashville than from the East to Chattanooga, though the latter was a shorter distance point, said:

> "Indeed, the findings of fact made by the Commission in this case *leave no room* for the contention that either *undue* preference in favor of Nashville or *unjust* discrimination against Chattanooga arose *merely from the act of the carriers in meeting the competition existing at Nashville*. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive conditions at Nashville, *the only consequence would have been to deflect the traffic at the reduced rates over other lines.* From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play."-
>
> 181 U. S., p. 19.

And the Court a little later, in the some connection, said:

> "To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in *deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public.*"
>
> 118 U. S., 20.

While, in the above case, it had been primarily insisted before the Interstate Commerce Commission, that charging a lower rate from the East to Nashville than was charged from the East to Chattanooga (a shorter distance point) was a violation of the Fourth Section of the Act—it was, at the same time, insisted that this favoring of Nashville over Chattanooga *also* amounted to an *undue preference*, under the *Third Section* of the Act. So it results that the above case is a square holding that whenever it appears that an admitted preference is the result of *controlling competition*, and that striking down the preference would only result in a *deflection* of the traffic, even at reduced rates, to other routes and lines (existing rates involved being reasonable rates), it follows as a *matter of law* that such a preference is not within the *prohibition* of the statute and is beyond the power of the Commission, or of the courts for that matter, to prohibit and condemn.

And from a very early time, the Commission has, itself, realized that any violation of the long and short haul provision of the Fourth Section of the

Act would be an undue preference in violation of the Third Section of the Act as well; and, conversely, that any competitive situation which would justify a departure from the long and short haul provision of the Fourth Section, would also justify, and render not undue, a preference under the Third Section of the Act. Such was the view of Commissioner Yeomans in the early case of *McClelen v. So. Ry. Co.*, 6 I. C. C. Rep., 588-589, where the Commissioner said:

> "The exaction, without *lawful excuse*, of a greater compensation in the aggregate for the shorter than for the longer haul over the same line in the same direction, the shorter being included in the longer, which is forbidden by Section Four of the Act to Regulate Commerce, is *only a form of unjust discrimination, or undue preference*, to which it seems Congress desired to call *particular attention* because of its prevalence in certain sections of the country."
>
> 6 I. C. C. Rep., 588-599.

Now, while the provisions of the *Fourth Section* of the Act have been changed since the decision in the case of *E. T., V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S., 1-29, which we have hereinbefore quoted from at such length, the provisions of the *Third Section* of the Act have not been changed at all since this decision; and it results that said decision is square and applicable authority with reference to the proper construction of the existing *Third Section* of the Act.

And in the *Elevation Allowance Cases* (*Peavy & Co.* v. *Union Pacific R. Co.*, 176 Fed. Rep., 423), the Circuit Judges quoted with approval the language used by Judge Jackson, later *Mr. Justice Jackson*, in the case of *Int. Com. Comm.* v. *B. & O. R. R. Co.*, 43 Fed. Rep., 37, which language of Judge Jackson has, as the Court said, been three times affirmed and adopted by the Supreme Court as the true interpretation of the law. In this connection the three Circuit Judges in the *Elevation Allowance Cases* said:

> "Much is said in argument of discrimination and preference. While general expressions may be found in the opinions of the courts to the effect that there must be no difference in charges not based on difference in service and that the Interstate Commerce Act was passed to secure equality of rates and to destroy favoritism (*New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 26 Sup. Ct., 272, 50 L. Ed., 515), the legal effect of the Act is that declared by Judge Jackson, afterwards *Mr. Justice Jackson*, of the Supreme Court, in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.* (C. C.), 43 Fed., 37, in these words, which have been *three times* affirmed and adopted by the Supreme Court as the true interpretation of the law:
>
> "'Subject to the two leading prohibitions, that their charges shall not be *unjust or unreasonable*, and that they shall not *unjustly* discriminate, so as to give undue preference, or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate

> Commerce *leaves common carriers as they were at the common law, free to make special contracts looking to the increase of the business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'* *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S., 479, 493; 17 Sup. Ct., 896, 42 L. Ed., 243; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184, 196, 197, 16 Sup. Ct., 700, 40 L. E., 935; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263, 12 Sup. Ct., 844, 36 L. Ed., 699; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S., 144, 173, 18 Sup. Ct., 45, 42 L. Ed., 414.
>
> "The Act *does not prohibit* all preferences or advantages or the production of all prejudices and disadvantages, *but only those that are undue and unreasonable.* Section 3, 24 Stat., 380; Section 15, as amended, 34 Stat., 589."
>
> 176 Fed., 423, 424.

And the learned Court *might* have said that the above-quoted language of *Judge Jackson* has been for the *fourth* time adopted and quoted by the Supreme Court in the case of *Interstate Commerce Commission* v. *Chicago G. W. Ry.*, 209 U. S., 119.

In the above case (176 Fed. Rep., 423), it was insisted that for certain carriers to pay an elevation allowance at Missouri River points while this allowance was not paid by carriers at St. Louis, whose lines participated with the carriers at the Missouri River in hauling the grain from the same fields in the West to the markets of the East, was an *undue* and unlawful preference and advantage to a *dealer* at the Missouri River, as compared to a *dealer* at St. Louis. By way of answering this contention, the Court said:

> "The answer is that the two dealers are not similarly situated. The Union Pacific Company and the Chicago Great Western Company neither reached St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation, which constitute *a controlling factor* at Omaha and Kansas City, do not exist at St. Louis, and that city is many hundred miles farther distant from the grain fields. *These facts extract from this difference every element of unjust discrimination or undue prejudice. E. T., V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 118 U. S., 1-12, 21, Supt. 516, 45 L. Ed., 719; *Interstate Commerce Commission* v. *Alabama Midland R. R. Co.*, 168 U. S., 144, 171, 175, 18 Supt. Ct., 45, 42 L. Ed., 414; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S., 648, 671, 674, 20 Supt. Ct., 209, 44 L. Ed., 309."
>
> 176 Fed. Rep., 425.

And recently, in the case of *Interstate Commerce Commission* v. *Diffenbaugh* (decided Nov. 23, 1911), 222 U. S., 42-50, the Court affirmed the above-quoted decision in the material respect which we are here discussing; and in the midst of its opinion, speaking through *Mr. Justice Holmes*, said:

> "We agree with the Court below that this decision" (of the Commission) "is erroneous in its conception of the *grounds* on which under the statute an advantage *may be pronounced undue*, and in its assumption that Congress has left the matter open by *merely permissive words*. The principle as to advantages is recognized in *Penn Refining Co. v. Western New York & Pennsylvania R. R. Co.*, 208 U. S., 208, 221. *The law does not attempt to equalize fortune, opportunities or abilities.*"
>
> . . . .
>
> "The Union Pacific made the allowances in question to elevators at its termini; it had *no motive* to make them anywhere else. The competitors of the Union Pacific concerned in the Diffenbaugh case were compelled *by competition* to make the same allowance at Missouri River points, but they also make it nowhere else. The Traffic Bureau, Merchants' Exchange of St. Louis, complained to the Commission that the result was a discrimination against St. Louis three-fourths of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore, this question of preference between cities does not need to be discussed. *But, as remarked below, the Union Pacific could not be complained of on this ground* (176 Fed. Rep., 424), *and it would be impossible to deny the same right to competing roads merely be-*

> *cause, as the result of the conditions, one city would gain and another lose. Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S., 648."
>
> 222 U. S., pp. 46, 48.

And the Interstate Commerce Commission itself, by its own decisions in the past, has fully recognized that it has not the *power* to condemn discriminations lawfully made.

For instance, in the case of *Commercial Club of Omaha* v. *Chicago & N. R. Co.*, the Commission, speaking through *Judge Knapp*, who was then *Mr. Commissioner Knapp*, said:

> "It must be remembered that not every inequality in rates constitutes a violation of the act. Discrimination is forbidden only when it is *unjust*. Preferences and prejudices are not prohibited unless they are *undue*. *The language of the statute implies* that there may be discriminations which are not *unjust* and preferences which are not *undue*."
>
> 7 I. C. C. Rep., 404.

And the Commission in a recent case has squarely ruled that it had no *power* to hold that according a reshipping privilege to one city, while not according similar privileges to another city, amounted to an *unlawful* discrimination, in a case where the differences in the circumstances and conditions surrounding the two markets operated to make the seeming discrimination not "undue," and consequently not in violation of law. This ruling was made in the case of *E. Sonheimer Co.* v.

Ill. Cent. R. R. Co. et al., 17 I. C. C. Rep., 60, wherein the Commission, speaking through *Judge Knapp*, then Chairman of the Commission, said:

> "It is well settled that a carrier must accord to points on its own line which are entitled to similar treatment, equal facilities of shipment and relatively equal rates. It is also well settled that *dissimilarity of circumstances and conditions* may justify a discrimination *which is not undue*. That is to say, any discrimination which exists must not exceed that which is *warranted by the differences in circumstances and conditions*. Are transportation and other conditions at Cairo similar to those at Memphis? If not, were the rates charged to Cairo dealers *unreasonable or unduly* discriminatory? To properly answer these questions requires a review of the *history of the reshipping or yarding privilege at Memphis, the reasons for its inauguration and maintenance, its effect upon rates, and an examination of the conditions surrounding the lumber business of both cities*."
>
> 17 I. C. C. Rep., 64.

And after the *Chattanooga Board of Trade* case (5 I. C. C. Rep., 546) had been before this Court in the case of *E. T. V. & G. Ry.* v. *Interstate Commerce Commission*, 181 U. S., 1-27, above quoted, the same case came back before the Commission for its decision in the light furnished by the ruling of the Supreme Court with reference to the force and effect of Cumberland River competition in preventing seeming discriminations at Nashville from being in violation of the act to regulate commerce; and the Commission, in its second decision of this case, speaking of its *lack of power* in the premises, said:

> "We have *no authority*, even if we had the *disposition*, to require an advance of the Nashville rates. Those rates are the product of influences which have long been in potent operation. *They are rates to which many and important commercial interests are adjusted and on which those interests are largely dependent.*"
>
> 10 I. C. C. Rep., 133.

And again, in the recent case of *Columbia Grocery Co. v. Louisville & Nashville R. R. Co.*, 18 I. C. Rep., 502-507, the Commission again recognized the presence of steamboat competition upon the Cumberland River at Nashville as a *determinative* circumstance depriving the Commission of the power, in view of the decisions of this Court above quoted, and other decisions of the Court, to strike down a *seeming* preference at Nashville, which would have been in violation of the act to regulate commerce had it not been that the controlling river competition at Nashville, as a matter of law, prevented the *seeming* preference from being "undue." In this connection the Commission said:

> "But, as was said in *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S., 172, 'The volume of carriage by the river is now comparatively small, but the *controlling force* of that water line *remains in full force, and must ever remain*

in force as long as the river remains navigable to its present capacity.'"
18 I. C. C. Rep., 506.

And in this same connection the Commission, still speaking of Nashville and the Cumberland River, said:

> "Nashville is a trade center. *Chamber of Commerce of Chattanooga* v. *So. Ry. Co.*, 10 I. C. C. Rep., 111. The rates thereto were established *on the theory of water competition of compelling or potential force*, and in competition with other carriers. Even if the force of water competition has been overestimated, *it has certain advantages of location, the benefits of which it is entitled to retain.*"
> 18 I. C. C. Rep., 506, 507.

From the foregoing authorities it results that as soon as it appeared to the Commission that any preference or advantage resulting to Nashville over the complaining Georgia points by reason of the existence of the reshipping privilege at Nashville was a preference extended by the carriers, *not voluntarily*, but as the result of *controlling water competition*, and to keep the traffic from being diverted to steamboats and other rail routes and lines, and the consequent unnecessary loss of business by the rail lines at Nashville—it followed that the Commission was *without the power* to condemn such preference as being "undue" because, by the foregoing decisions, such a preference is *not in violation* of the Act to Regulate Commerce; and, in the language of this Court, "leaves no room" for the order of the Commission made in the case at bar.

We accordingly submit that the Commerce Court was clearly correct, upon the authorities hereinbefore noted and other authorities noted in its opinion, in holding as follows:

> "We think that the undisputed facts demonstrate that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River, and on that account alone, and that the undisputed evidence would not support any other findings upon that proposition."
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> Trans., p. 1106.
>
> . . . .
>
> "Our conclusion in regard to the whole case is that under the facts appearing in the record the reshipping privilege at Nashville is not in violation of Section III, nor a discrimination in favor of Nashville as against Atlanta and the other Georgia points, and that the facts being undisputed it is within the undoubted power of this court to so declare as a matter of law applicable to such a state of facts."
>
> Trans., p. 1108.

C.

Appellants' Contentions With Reference to the Law as Applied to the Undisputed Facts.

In presenting Assignments of Error I, II and III, our adversaries take the position that where a preference is shown to exist, the question as to whether that preference is "undue" is always a question of fact foreclosed by the finding of the Commission, and can never be a question of law upon which the Commission can be reviewed by the courts. This view of our adversaries is the *fundamental error* underlying all their contentions in this case, and is the *fundamental error* underlying the report and order of the Commission in question.

The right of the carriers to make discriminations and give preferences which are not "undue," arises from the *law*, and not from the *assent* or *permission* of the Commission. The decision of the Commission in this case came *after* its decision in the *Elevation Allowance Cases* (14 I. C. C. Rep., 315; 14 Interstate Commerce Reports, 317, 331, 510), and *before* the decision of the circuit judges in the *Elevation Allowance Cases* (176 Fed. Rep., 469), and, of course, before the decision of this Court in said cases (222 U. S., 46, 48); and the result is that the Commission made the same fundamental error in the case now before your Honors as it made in the *Elevation Allowance Cases*. With respect to this fundamental error in the *Elevation Allowance Cases*, the Court, speaking through Mr. Justice *Holmes*, said:

> "We agree with the court below that this decision" (of the Commission), "is erroneous in its conception of the *grounds* on which under the statute an advantage may be pronounced *undue*, and in its assumption that Congress has left the matter open by *merely permissive* words. The principle as

> to advantages is recognized in *Penn Refining Co. v. Western New York & Pennsylvania R. R. Co.*, 208 U. S., 208, 221. *The law does not attempt to equalize fortune, opportunities or abilities.*"
>
> 222 U. S., 46.

The right to give discriminations and advantages which are not "undue" arises under the Act itself, does not depend upon the mere consent or permission of the Commission—that is, Congress has not "left the matter open by merely permissive words."

The Commission, in the case at bar, made the same fundamental error as it made in the *Elevation Allowance Cases*, by assuming that it had the right, and was under the duty, to condemn any discrimination unless the facts were such as to move the Commission, in its discretion, to *permit* the discrimination; when, under the law, the power of the Commission to condemn an admitted discrimination is "the other way around"; and the Commission has no power to condemn an admitted discrimination as being undue, and consequently unlawful, until it finds substantial identity and similarity in the circumstances surrounding the point discriminated against and the point given the advantage.

For instance, in the first report of the Commission, which condemns the reshipping practice at Nashville as being both unlawful in substance and also unlawful because discriminatory, we find the Commission stating, hypothetically, the uncontradicted proof developed at the first hearing with reference to the reasons which constrained the origin and continuance of the reshipping practice at Nashville (16 I. C. C. Rep., 596); and the Commission did not find that these circumstances, peculiar to Nashville and not present at the Georgia points, were *untrue* at all; and later, in its first report, the Commission contented itself, upon the question of discrimination, by making the following announcement:

> "We are *not convinced* that the circumstances and conditions under which the reshipping privilege is accorded at Nashville are *so dissimilar* from those obtaining at the other points involved in this traffic as to *justify* giving it *our sanction on that ground.*"

And in the second and final report in this case the Commission proceeded upon the same idea, and said they did not find "such conditions of dissimilarity at Nashville as would *justify* giving the *sanction* of the *Commission*" to the reshipping practices at Nashville (Trans., p. 1077). We say it is very plain that the Commission proceeded in this case, just as it erroneously proceeded in the *Elevation Allowance Cases*, upon the theory that it must condemn any preference as a violation of the Third Section of the Act, unless the Commission, in its grace and discretion, found such dissimilarity of circumstances as would justify it in permitting and sanctioning the preference.

That this is a total misconception has been announced by this Court, not only through Mr. Justice *Holmes* in the *Elevation Allowance Cases* above quoted, but before by Mr. Justice *Shiras*, in the *Import Rate Case*, where the Court said:

> "The *mere circumstance* that there is in a given case a preference or an advantage does not, of *itself*, show that such preference or advantage is indue or unreasonable within the meaning of the act. Hence it follows, before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts," etc.

When our adversaries insist that the finding of the Commission that an admitted discrimination is "undue," absolutely forecloses the question from judicial inquiry, they are making the same fundamental error that the Commission made in the case at bar and in the *Elevation Allowance Cases*, by supposing that all discriminations are prohibited unless the Commission gives its sanction or permission to the same. Since the right of the carriers to make preferences which are not "undue" arises from the Act, and not from the permission of the Commission, it follows, of course, that if the Commission, upon the undisputed evidence lawfully developed at the hearing, has failed to give to the carriers this right which they have under the Act, a justiciable question is presented, and the Court will annul the order of the Commission. And the Court will examine the facts far enough to determine whether or not there was "substantial evidence" to sustain the order—a mere "scintilla" of proof not being sufficient to sustain the order.

> *Int. Com. Comm. v. Union Pac. R. R.*, 222 U. S., 547, 548.

But our adversaries say that a Court has no jurisdiction to determine, as a matter of law, that the Commission exceeded its power in not regarding certain facts as so "dominant," or determinative, as to be controlling on the question of the undueness of a discrimination—even though the proof as to the existence of these supposed "dominant" facts was undisputed. In other words, it is insisted that the river competition at Nashville, which, by the undisputed proof, constrained the adoption and continuance of the reshipping practice as a device to meet the peculiar competitive situation at Nashville, cannot, of *itself*, dominate and determine the question of the undueness of the discrimination. In this our adversaries are in error.

We have hereinbefore quoted the decisions holding that whenever it appears that the inequality or preference complained of merely meets and reckons with competition present at the preferred point, so that striking down the preference would only deflect the traffic and lose the business to the carriers, without benefiting or changing the position of the complaining point, these facts are *dominant*, and, in and of themselves, extract from the alleged preference every element of undueness, and "leave no room" for the Commission to find a violation of the Act.

Ante, pp. 52-65.

As was said by the Court, speaking through Mr. Justice *Brown*, in the case of *I. C. C.* v. *B. & O. R. R.* (the *Party Rate Case*), 145 U. S., p. 282:

> "In this connection we quote with approval from the opinion of Judge Jackson in the court below: 'To come within the inhibition of said sections' (Sections 2 and 3) 'the differences *must be made* under *like conditions;* that is, there *must be contemporaneous service* in the transportation of *like kinds of traffic* under substantially *the same* circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and *there must be found to exist substantial identity of situation and of service*, accompanied by *irregularity* and *partiality* resulting in undue advantage to *one*, or undue disadvantage to the *other*, in order to constitute unjust discrimination.' "
>
> 145 U. S., 282.

Where a preference merely meets and reckons with controlling competition peculiar to the preferred point there cannot be the "like conditions" and "substantial identity of situation" which must be found before an admitted preference can be held undue. As was said by Mr. Justice *Holmes* in the *Elevation Allowance Cases*, "the law does not attempt to equalize fortune, opportunities or abilities," and the right to compete cannot be denied "merely because, as the result of conditions, one city would gain and another lose."

222 U. S., 46, 48.

And of course, in the case last mentioned, the Court did *exactly* what our adversaries insist the

Court cannot do in the case at bar; that is, the Court reviewed and annulled an order of the Commission because the facts before the Commission showed that an admitted discrimination was not undue or unlawful, within the meaning of the Act.

But our adversaries insist that there was substantial evidence before the Commission tending to show that the reshipping practice at Nashville was not installed and continued alone as a device by the carriers to meet water competition peculiar to Nashville. In this our adversaries are in error.

On pages 17-22 of the brief filed on behalf of the Interstate Commerce Commission certain testimony of Major Stahlman and Mr. Barham is quoted. It would seem to be a sufficient answer to this testimony to say that it was developed in the Commerce Court, and was not before the Commission at all.

It is true that in this testimony of Major Stahlman and Mr. Barham in the Commerce Court it was developed that the continuation of the reshipping practice at Nashville operates to equalize Nashville with the Mississippi and Ohio River crossing points, as well as operates to meet steamboat competition; and it is likewise true that this testimony taken in the Commerce Court reveals that all grain stored under the reshipping practice at Nashville, as it is hauled to the South from Nashville, is localized to the Nashville lines; whereas if reshipping were abolished and the grain could be stored only at the Ohio River crossings, the Nashville lines would have more competition in hauling the grain to Southeastern destinations. This is absolutely true.

But all of this is *very far* from tending to show that the reshipping practice was installed and continued at Nashville for the purpose of taking business from the Ohio River crossings, and not from boats on the Cumberland River. As we have hereinbefore shown, the reshipping practice at Nashville was installed and has been continued *solely* for the purpose of preventing a deflection of the traffic between the Ohio River and Nashville to the boat lines, and that it was so installed in 1872, and has been ever since continued; and that its abolition would deflect the traffic to the boat lines between Ohio River crossings and Nashville, and that, even now, the boat lines do a substantial amount of this traffic.

Ante, pp. 30-50.

We have also seen that *after* the installation of the reshipping practice at Nashville these Ohio River crossings acquired rail connections with the Southeast, and had reshipping practices installed at all of them, so that now all these crossings reach all Southeastern destinations exactly as Nashville, with the reshipping practice, is able to do; and, of course, *one effect* of the reshipping practice at Nashville is to enable it to compete with the Ohio River crossings, which have now come to be equalized with the ancient and continuing Nashville situation; and, of course, if reshipping were abolished at Nashville, Nashville and the Nashville lines would lose business to the Ohio River crossings and lines serving these crossings which do not run via Nashville.

The fact that continuing the reshipping practice at Nashville enables Nashville and her rail lines to compete with the Ohio River crossings and their rail lines, is merely one of the *results* of these river crossings having been equalized with the ancient and continuing Nashville situation, and is not either the *cause* or the *result* of the installation or continuance of the reshipping practice at Nashville. Of course, it is a controlling thought now with the Nashville lines that they want to continue the reshipping practice at Nashville, for two reasons: (1) to meet boat competition on the Cumberland River; and (2) to keep from losing the traffic to their competitors serving Ohio River crossings, where these competitors have in later years exactly equalized with the ancient and continuing reshipping practice, and the through rate from the Ohio River to Southeastern destinations thereby maintained, at Nashville.

In other words, the reshipping practice at Nashville was begun and continued solely as a shield against boat competition on the Cumberland River, and if this shield be withdrawn the river competition will successfully assert itself; but the situation at the Ohio River crossings is such *now* that if this shield be withdrawn all the traffic that the Nashville lines do not lose to the boats on the Cumberland River they will lose to their competitors serving the Ohio River crossings, all of which have subsequently come to be equalized with the Nashville market as to rates and stoppage in transit practices. And our adversaries insist that since the reshipping practice is now not only a shield against boat competition, but also operates as a shield against competition at the Ohio River, which has asserted itself subsequently to the beginning of the reshipping practice at Nashville, the reshipping practice now does something more than meet the river at Nashville, and is therefore an undue discrimination. This, for the reasons noted, we say is fallacy, because if this reasoning were sound, then any discrimination begun by a carrier at a point where it was necessary to meet a peculiar controlling competitive situation, would become undue, and therefore unlawful, as soon as other roads at competing markets equalized with the reduced rate at the preferred point; and thus the right of carriers to make due and just preferences to meet competition, peculiar to any point, could be taken from them and destroyed, in every case, by the subsequent action of their competitors at other markets.

The above suggestions also answer a similar argument which we respectfully submit is fallacious, contained in the learned brief filed on behalf of appellants, W. S. Duncan & Co. et al., at pages 18-22, *et seq.*

On page 17 of this last mentioned brief of Mr. Wimbish there is a reference to page 630 of the transcript, containing a quotation from the testimony of Mr. *Horace Smith*, Vice-President of the N., C. & St. L. Railway, where Mr. Smith is quoted as saying:

> "Nashville would be at a disadvantage to that extent; and the object was simply to equalize it. The equalization is as near as I can discover an exact one."

It might be inferred from this quotation in the brief that Mr. Smith was here saying that the object of the reshipping practice at Nashville was simply to equalize Nashville with the Ohio River crossings. This is error. Mr. Smith was speaking, in the quotation noted, of the practice of elevation allowances at Nashville, which were begun and continued for the purpose of equalizing Nashville with the Ohio River crossings, after elevation allowances had been begun at those crossings.

Trans., pp. 629, 630, 631.

The question of elevation allowances at Nashville is not now in this case. Such allowances were condemned in the first order of the Commission, but this part of the first order was suspended by the Commission, and with reference thereto the Commission in its last order in this case said:

> "One of the alleged discriminatory privileges complained of is the allowance at Nashville by the defendants reaching that city of three-quarters of a cent per 100 pounds in payment of so-called elevation. In its original report in this case, 16 I. C. C. Rep., 590, the Commission, following its action with regard to elevation allowances at other places, condemned the practice. The Commission has, however, in order to prevent *discrimination between dealers at different places*, held its order in abeyance awaiting the decision of the courts with respect to a *similar allowance* condemned in another case."
>
> 21 I. C. C. Rep., 187.

And again, on page 18 of this brief, Mr. Wimbish quotes from the last order of the Commission with reference to the reshipping practice at Nashville, a clause saying:

> "the privilege was particularly intended to take care of the through movement from the Northwest." Trans., p. 1073.

The Commission did say this, but, in saying it, it was evidently proceeding upon some of the *ex parte* information which it admits in its sworn answer it acquired in an investigation outside of the hearing; because no such evidence was developed at either of the hearings before the Commission at all. In fact there was no through movement of grain "from the Northwest" when the reshipping practice was established. The Northwestern grain fields have been since developed; and the rail connections of the Ohio River crossings with the Southeast, as we shall see, were not then constructed. The uncontradicted proof lawfully developed before the Commission at the hearing showed by the United States census for 1870, and otherwise, that the center of the grain production was then in the valley of the Wabash River (Trans., pp. 765-768), from which the grain moved to Nashville freely by steamboats plying the waters of the Wabash, Ohio and Cumberland Rivers.

On page 23 of the same brief, Mr. Wimbish cites pages 812, 813 and 1075 of the record, as purporting to contain evidence alleged to have been before the Commission to the effect that no grain could move economically by rail to the river crossings and thence by river to Nashville, with another transfer from river to rail for future shipment. At the place indicated in the record Mr. Compton did say that "perhaps" it was true, "under present conditions" that grain could not move from Cairo to Nashville by boat and then from Nashville to Atlanta by rail, with a transfer from rail to boat at Cairo and from boat to rail at Nashville, for the amount of the through rail rate from Cairo via Nashville to Atlanta. This, we submit, does not amount to a respectable "scintilla" of evidence. The witness said this was true "perhaps," "under present conditions," and with reference to Cairo. The same witness speaking with reference to the result that would follow abolition of the reshipping practice at Nashville, was asked and answered:

> "*Mr. Baxter:* State the extent, if any, to which, in your opinion, the Cumberland River boat tonnage would increase as a result of the withdrawal of the present reshipping arrangements at Nashville.
>
> *Mr. Compton:* It would depend largely upon the ability of the Nashville merchants to avail themselves of the Cumberland River and at the same time compete with the merchants located at the various Ohio and Mississippi River crossings.
>
> The Nashville merchants would be compelled to transfer the grain at the various Ohio and Mississippi River crossings from the elevator or car to barge, transport it by river to Nashville, and transfer it from the

> boat or barge to the warehouse or elevator or depot, and on shipping from Nashville south they would be compelled to pay the Nashville proper rates.
>
> If they could do this at the difference between the rates from the Ohio River to the South and the rates from Nashville to the South, *and I believe they could*, they could continue to compete with the Ohio and Mississippi River points and the boat tonnage in the Cumberland River would undoubtedly increase to an immense extent."
>
> Trans., p. 829.

And we have hereinbefore cited the Court to the great mass of undisputed affirmative testimony before the Commission to the effect that grain could be, and *actually was*, brought from the Ohio River crossings to Nashville by boat, with a transfer at both the Ohio River and Nashville, at a cost so small that the grain could be, *and was*, reshipped to the Southeast on the full local rate out of Nashville, the total transportation charge being not more, and in some instances less, than the all-rail through rate via Nashville from the Ohio River to the same destination.

Ante, pp. 31-37.

And, on page 18 of the same brief, Mr. Wimbish makes an assertion similar to the one made by the Commission, to the effect that the carriers maintaining the reshipping practice at Nashville have not reduced the rates to Nashville in competition with the river, nor the rates from the Ohio and Mississippi River crossings to the Southeast, nor from Nashville to the Southeast. The Commission did say this (Trans., p. 1075). In saying it, however, the Commission was, of necessity, proceeding upon some of its personally obtained *ex parte* information, not lawfully developed at the hearing, which outside information the Commission, in its sworn answer, admits it did receive and consider in condemning the reshipping practice at Nashville. The record of the hearings contains no such evidence. Upon the other hand, the undisputed testimony before the Commission was to the effect that Cumberland River competition had dictated the entire basis of rates from the Ohio River to the Southeast, and that the first departure from the long and short haul clause in the United States was made by the Louisville & Nashville Railroad in charging less from Louisville to Nashville than to intermediate points, because of steamboat competition on the Cumberland River.

> Testimony of C. B. Compton, Trans., pp. 803, 807, 812-815; H. F. Smith, pp. 627, 628; Chas. Barham, pp. 780-783.

And in the first report of the Commission which condemned the reshipping practice at Nashville, the Commission had in mind the above-noted testimony, and stated as one of our insistences (which it did not in said first report find to be untrue):

> "That the location of Nashville on the Cumberland River, a navigable stream, was sufficient to establish not only a basis of rates from the Ohio and Mississippi River crossings to Nashville and Southeastern ter-

ritory, but also to establish the custom of reshipping at Nashville;" etc.

Somewhere, at some time, the Commission acquired some information other than that lawfully developed at the hearing, which it, of course, believed warranted its conclusion that the Cumberland River had not caused any reduction of rates between the Ohio River and Nashville, or between the Ohio River and the Southeast, or between Nashville and the Southeast, which outside information we have never had the opportunity to rebut, refute or explain.

And again, on page 17 of the same brief, Mr. Wimbish cites pages 705, 706 and 709 of the record as furnishing some evidence before the Commission that the rail lines south of Chattanooga "shared in the expense" of maintaining the reshipping practice; and the learned counsel there argues that since these lines would have participated in the movement from Nashville to the Southeast whether the grain came to Nashville by river or rail, it is manifest that the primary thought inducing "their concurrence" was the attracting of a larger movement from the Northwest through Nashville by means of these transit privileges, and not the meeting of the Cumberland River competition.

What induced the concurrence of lines south of Chattanooga in the installation of the reshipping practice at Nashville is no evidence bearing upon the issue of the involuntary extension of the reshipping practice by the lines at Nashville as a device to meet Cumberland River competition. A reference to pages 705, 706 and 709 of the transcript, cited by our adversaries in this connection, does not show that the lines south of Chattanooga "shared in the expense" of maintaining the practice at Nashville. These lines have merely consented to become parties with the Nashville lines to through rates from the Ohio River on grain which the Nashville lines permit to be interrupted with a stoppage in transit privilege at Nashville, without increasing or altering the through rate. In other words, these connections of the Nashville lines south of Chattanooga admittedly get the same revenue for hauling on into the Southeast the grain which is stopped at Nashville under the reshipping practice as they would get if the grain moved from the Ohio River, via Nashville, without stoppage in transit there.

Indeed when the lines south of Chattanooga consented to the original installation of the reshipping practice at Nashville in 1872, there were no other competing lines from the Ohio River crossings to the Southeast, except the lines running via Nashville, so these connections south of Chattanooga could have had no motive, as the learned counsel argues, to induce the movement of grain from the Ohio River via Nashville, instead of via other lines with which they did not connect. The undisputed proof before the Commission showed that the Illinois Central Railroad was not completed south of Cairo until after the reshipping practice was installed at Nashville, and that the Mobile and Ohio was not completed southward between the

Ohio River and Columbus until 1881, or nine years after the installation of the reshipping practice at Nashville.

Trans., p. 769.

With reference to the great mass of *undisputed* testimony before the Commission demonstrating that the reshipping practice at Nashville, which was the *first* transit practice ever extended in the United States, and was there begun in 1872 and has since continued, not *voluntarily*, but as a legitimate *competitive* method of meeting a situation *peculiar* to Nashville, the Commission in its last report *waived* this mass of undisputed testimony aside and *perfunctorily* remarked:

> "The carriers assert that they did not voluntarily establish the privilege of reshipping at Nashville, but that it was forced upon them by conditions over which they had no control. It is not *infrequent* in our investigations of matters dealing with discrimination to find *the carriers* whose tariffs have contained rates or practices in violation of the principles of relative justice *defending their action* as being a necessary result of the logic of a situation from which they would have been glad to escape had any means of escape been open to them."

21 I. C. C. Rep., 192.

We do respectfully submit that the contentions which other carriers have "not infrequently made," in *other* investigations before the Commission, have nothing whatever to do with the case at bar;

and when the learned Commission *imagined* that it had the power to ignore the mass of *undisputed* testimony in the case at bar, and *perfunctorily* waive it aside, simply because it *did not like* the contentions that *other* carriers had made in some *other* cases, we respectfully submit that the learned Commission was *very far* from exercising *powers* conferred upon it by the Congress of the United States.

And the undisputed proof before the Commission *literally* and *emphatically* was that reshipping would not have been begun and would not be continued at Nashville but for the *river competition.*

Trans., p. 783.

In concluding under this head, we submit that all of the references to the transcript made by our adversaries as indicating any substantial evidence before the Commission tending to show that the reshipping practice at Nashville amounted to an "undue" discrimination are either references to proof developed, not before the Commission, but in the Commerce Court, or they are misconceived, erroneous and fallacious references.

And all findings of fact in the report of the Commission to a like effect were of necessity based upon the *outside information* of the Cominission, because no such facts are contained in the evidence adduced at the hearings which the Commission *certifies* was "*all the evidence taken* before the Commission" in this case.

Trans., p. 523.

II.

The Fourth Assignment of Error.

The Fourth Assignment of Error is as follows:

> "The Commerce Court erred in holding that water competition at an intermediate point in a through route gave the carriers a legal right to maintain a practice of stopping, unloading and within six months rebilling and reshipping the traffic upon through rates, at such intermediate point, although the Interstate Commerce Commission had determined that said rebilling and reshipping privilege granted at one intermediate point while the carrier refused to grant such privilege to other intermediate points named in the order gave an undue and unreasonable preference and advantage in favor of the intermediate point at which the privilege was granted, notwithstanding the alleged water competition at said intermediate point."

In support of this assignment of error our adversaries take the position that water competition on the Cumberland River, between the Ohio River and Nashville, might justify a reduction of the local rail rate between the Ohio River and Nashville, but that this water competition cannot justify the reshipping practice at Nashville, protecting a through rate from the Ohio River to Southeastern destinations.

Admittedly the rail lines at Nashville could have met Cumberland River competition in the beginning, and could meet it now, by reducing the local rail rate between the Ohio River crossings and Nashville; and the grain could then move from the Ohio River to Nashville by rail on the reduced local rate, be stopped and stored as long as a shipper might desire, and then move out from Nashville to the Southeast on the full local rate. The rail lines at Nashville could fight the river in this way if they so desired.

The rail lines at Nashville, however, desired to compete for the through business from the Ohio River to the Southeast with the boats by the reshipping practice at Nashville, instead of by the reduction of their local rate, which is 10 cents between all the Ohio River crossings and Nashville. A reduction of this local rate would apply to all grain consumed locally at Nashville, or at points basing on Nashville, and this would unnecessarily have sacrificed large revenues. Whereas, without reducing the local rate (admittedly reasonable) between the Ohio River and Nashville, the rail lines can, by the reshipping practice, admittedly, successfully compete with the boats on the through business, which is the great bulk of the business, and at the same time share the local business with the boats at a somewhat higher rate. The point made by our adversaries under this assignment of error was developed at the hearing before the Commission by questions propounded by Mr. Commissioner Clements to the witness, Mr. Barham. To get the point accurately before your Honors, we quote the following from the record:

"*Commissioner Clements:* You know there have been many decisions to the effect that where water competition enters into the situation (assuming it does to the extent that has been stated here at Nashville, on the Cumberland River) the meeting by the rail carriers of that kind of competition justifies the lower rates, lower than would be charged for a shorter distance—a long and short haul proposition as applied to a water competitive point. But do you recall any case in practice by the railroads where competition of that sort has been used to justify the extension of lower rates by a re-shipping plan or otherwise to points beyond and into a territory where there are places that are wholly unaffected by it?

Mr. Barham: Not within my experience; I do not think there are any such in the South.

Commissioner Clements: Now, is that not what you do at Nashville?

Mr. Barham: What is that?

Commissioner Clements: You do not only meet the water competition on traffic to Nashville where the water is there and potent, and present; but you apply a rate arrangement which takes the traffic by Nashville and to the whole Southeastern territory at a lower rate finally, basing it on this water competition which is in fact existing at Nashville, and not beyond.

Mr. Barham: I think not. I think probably you have an erroneous idea of that. The water route from the confluence of the Ohio and Cumberland Rivers to Nashville is as much a part of the through service, or could be made so, as the water service to

Nashville proper. In other words, if by bringing grain to Nashville at six or seven cents and combining that with our local rate of seventeen cents to Atlanta, we fix a rate of twenty-three or twenty-four cents, that is the utmost we can charge for an all-rail haul to Atlanta. That is the extent to which we have recognized the Cumberland River competition.

Commissioner Clements: That is, it is recognized upon business for beyond, but not to Nashville.

Mr. Barham: No. Probably I ought to explain that a little bit more fully. I gather that this is your idea, that having recognized Cumberland River competition as a factor in the through competition, we have ignored it at Nashville proper.

Commissioner Clements: That is involved.

Mr. Barham: We did not change the ra'e to Nashville for this reason. As I stated at the outset, we did not expect to eliminate competition on the Cumberland River; we did not expect to get all the business. We could only expect to get a reasonable part of it. We were influenced by the thought that if we could practically stop and eliminate the boats as a factor in through traffic, that we could afford to divide the local business on the basis of ten cents, or whatever the local rate might have been at that time.

Commissioner Clements: So that you have undertaken to meet it only with respect to through business and not on local business?

> *Mr. Barham: That is it precisely. In other words, we have minimized our sacrifice just as much as we could."*
>
> Trans., pp. 792, 793.

The rail lines at Nashville having the right to compete or not with the boats, it is very obvious to us that these rail lines, by the reshipping practice at Nashville, can more actively compete for the through business, which is the great bulk of the business, than for the local business without violating the law.

In the case of *I. C. C. v. Chicago & G. W. Ry.*, 209 U. S., 108-123, the Court, speaking through Mr. Justice *Brewer*, after the passage of the Hepburn Act, quoted with approval for the fourth time the language used by Mr. Justice *Jackson* when he was Circuit Judge, in the case of *I. C. C. v. B. & O. R. R. Co.*, 43 Fed. Rep., 37, 50. In this 209 U. S. case Justice *Brewer* said:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, *yet in no proper sense is the public a general manager.* As said in *Int. Com. Comm. v. Ala. Mid. R. R. Co.*, 168 U. S., 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this Court, in *Int. Com. Comm. v. B. & O. R. R. Co.*, 43 Fed. Rep., 37, 50:

"'*Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.*'"

209 U. S., pp. 118, 119.

And in another recent case it has been held that in the absence of unreasonable rates and undue discrimination the powers of the Interstate Commerce Commission do not extend to regulating and controlling the *policy* of the owners of railroads in fixing rates.

Southern Pacific Co. v. *Interstate Commerce Commission* (Willamette Lumber Case), 219 U. S., 433-443, 452.

And later we will see that in the *Import Rate Case* the Court held that the carriers, without violating the law, could do *just what* our adversaries under this assignment insist they cannot do.

Post, pp. 104, 105.

We say it results from the foreging authorities that the rail carriers of Nashville, so long as they do not charge unreasonable rates or voluntarily grant any *undue* preference, are as free as an individual, and as free as they were under the *common law*, to specially "classify their traffic, to adjust and apportion their rates, so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits" (209 U. S., 119); and when the reshipping practice, admittedly, has been found by the carriers to "adroitly" meet the competitive situation at Nashville, without an unnecessary sacrifice of revenue in the way of reducing admittedly reasonable rates, and when the *Commission* has *so found*, it follows that this reshipping practice, even though by it the carriers actively compete for the *through* business and do not actively compete for *local* business, can amount to no *undue* preference or advantage.

It should be constantly borne in mind that not only did the undisputed proof before the Commission show that the local rate from the Ohio River to Nashville, the local rates from Nashville to the Southeast, and the through rates between the Ohio River and the Southeast, protected and applied at Nashville by the reshipping practice, are all reasonable rates—but the very fact that the Commission in this case entered an order in the *alternative* which permits the continuance of all these rates and the reshipping practice at Nashville, provided similar practices are given to the complaining Georgia points, is equivalent to a *finding* by the Commission that all these rates are *reasonable rates.*

Penn Refining Co. v. *West. N. Y. & P. R. R.*, 208 U. S., 217;
E. T., V. & G. Ry. v. *I. C. C.*, 181 U. S., 23;
I. C. C. v. *L. & N. R. R. Co.*, 190 U. S., 273, 284.

Indeed, it would seem the controlling thing in the last report of the Commission in this case, wherein it held the reshipping practice at Nashville an "undue" discrimination against the Georgia points, was that the Commission found the reshipping practice to be an "adroit" arrangement whereby the rail lines were enabled to successfully compete with the boats without reducing their reasonable rates. In its last report the Commission found:

> "It is a *recognized fact* that the existence of the Cumberland River has produced conditions which have been reflected in freight rates and adjustments thereof to Nashville, but it is important to inquire just what effect the river has upon the traffic here involved. In meeting the river competition on this grain traffic from the Northwest, the carriers have not reduced the rates to Nashville in competition with the river, but they have left that city to the enjoyment of what traffic could be moved to that point at river rates of transportation for local consumption. At the same time, by the adoption of the reshipping privilege at Nashville, commercial preference and advantage have been ac-

corded the interests there engaged in supplying the immense territory to the southeast with its increasing consuming power. In other words, the present adjustment *promotes both the local and the through grain business* and *adroitly* keeps the line of cleavage between them clear and distinct. The grain moving into Nashville locally, via the river and otherwise, can hardly compete with the through business to the Southeast under the present tariffs, and grain moving into and out of Nashville under the transit privilege cannot very well compete with the local industry. This twofold adjustment leaves little more that could be done to put Nashville on an advantageous basis as compared with all rivals in that territory.

"In respect to this river competition it is important to note that it has not in fact reduced the rate to Nashville, *nor the rate from the crossings to the Southeast*, nor the rate from Nashville to the Southeast. *The reshipping plan seems to have pretty well destroyed this river competition without reducing materially these charges.* The evidence is to the effect that reshipping was adopted to secure to the railroads a portion of the business. *As to this immensely valuable through business from the Northwest to the Southeast, it has absorbed practically all.* In fact, under present conditions, with the cost of trans-shipment from rail to river and from river to rail, this water competition is greatly nullified."

21 I. C. C. Rep., 190, 191.
Trans., pp. 1074, 1075.

This solemn recognition and finding by the Commission that Cumberland River is a potent competing factor at Nashville, and that, by the reshipping practice, the rail lines have "adroitly" and successfully reckoned with this competition, without having to reduce their local rates (found by the Commission to be reasonable as the result of the alternative nature of its order), coupled with the condemnation of the reshipping practice at Nashville as an undue discrimination against the complaining Georgia points, where admittedly no such similar competition, or river competition at all, exists or is found by the Commission to exist, all amount to a violation of the law upon the part of the Commission, because it is assumed that the Commission has the power to prohibit the carriers from "adroitly" protecting their revenues, when admittedly they are charging reasonable rates and are guilty of no "undue" discrimination. The carriers are as free to be "adroit" and skillful in protecting their revenues as they were at common law, or as an individual is, subject alone to the express inhibitions contained in the Act to Regulate Commerce.

Under this Fourth Assignment of Error our adversaries also considered a fact not before the Commission at all and for the first time developed in the Commerce Court; that is, that the difference between the combination of the local rate from the Ohio River to Nashville and the local rates from Nashville to Southeastern destinations on the one hand, and the through rates from Ohio River via Nashville to Southeastern destinations on the other hand, is not always 3 cents, in reaching certain destinations, but is sometimes, and with reference to some destinations, more than 3 cents.

It would seem to be a sufficient answer to this suggestion to merely say that these facts were not before the Interstate Commerce Commission at all, were not mentioned by the Commission in condemning the reshipping practice at Nashville at all, and were for the first time mentioned in the Commerce Court.

But we will, out of caution, notice upon its merits, this suggestion of our adversaries.

It was developed in the Commerce Court that the local rail rate from all the Ohio River crossings to Nashville upon grain is 10 cents per 100 pounds The local rate from Nashville to Atlanta, for instance, is 17 cents per 100 pounds, the combination being 27 cents. The through rate from the Ohio River crossings via Nashville, or via any other route to Atlanta, is 24 cents—the difference between the through rate applied at Nashville by the reshipping practice, and the combination of locals on Nashville being 3 cents.

In reaching almost all destinations in Southeastern and Carolina territory via Nashville, this difference between the through rate from the Ohio River and the Nashville combination is just *three cents*. In reaching all the complaining Georgia points, and all other points in Georgia to which through rates are made from the Ohio River, except South Atlantic Coast points, this difference or shrinkage at Nashville is just *three cents*. To South Atlantic Coast points this differential is four cents—that is, to Charleston and Savannah. To Chattanooga the difference or shrinkage at Nashville is five cents, etc.

In the Commerce Court our adversaries for the first time called attention to this varying differential at Nashville. They argued from this varying difference that reshipping at Nashville did something more than meet Cumberland River competition. They argued that in establishing the differential of seven cents, Nashville under Louisville, the rail lines had assumed seven cents as the measure of the boat competition on the Cumberland River; and that in all cases where the difference at Nashville between the through rate and the Nashville combination was more than three cents (representing the difference between the local rate of ten cents from the Ohio River to Nashville and the assumed boat rate of seven cents), the rail lines at Nashville were doing something more than meeting Cumberland River competition by the reshipping practice at Nashville. In this contention we insist our adversaries are in error.

It was made very plain in the Commerce Court how the difference at Nashville between the through rate from the Ohio River to Southeastern destinations, which is three cents in reaching almost all Southeastern points, including all the complaining Georgia points, *sometimes*, with respect to some few destinations, becomes more than three cents. This difference was in the beginning only three cents in reaching all destinations. But, in the course of time, new short rate making routes and lines were constructed between the Ohio River and some Southeastern destinations, and the new through rates established by these new routes and lines had to be met by reduced through rates of the lines running via Nashville, or the business would not move over the Nashville lines at all; and in such cases the local rates from Nashville proper out to Southeastern destinations, being reasonable rates, would not, on account of the competition of the through rates of the new rate-making lines, have to be reduced in the same proportion as the through rates via Nashville would have to be reduced as the result of the competition of the new lines. In such cases it is manifest the difference at Nashville might become more than three cents.

Trans., pp. 443, 444.

And as demonstrating that the fact that this difference at Nashville varies and sometimes exceeds three cents, is *immaterial* to any question of discrimination against Georgia points, it is only necessary to say that in all cases where this difference exceeds three cents, it would be made exactly three cents by reducing the local rates south of Nashville. Not a pound of the business handled at Nashville *under the reshipping practice*, for Southeastern destinations, moves upon this local rate south of Nashville, and there is no attack whatever in this case upon the reasonableness of any of the local rates south of Nashville.

In other words, by the reshipping practice at Nashville, the rail lines, by the undisputed testimony before the Commission, undertake to merely compete for the *through* business.

Trans., p. 793.

And we insist, from the authorities hereinbefore noticed, that these rail lines by this reshipping practice, have the right to compete for this through business, and at the same time decline to recognize competition with the boats with reference to local shipments into and out of Nashville.

Ante, pp. 89, 90.

And it is proper again in this connection to recall that this "varying difference" at Nashville is not condemned by the Commission, but its continuance is *authorized* by the Commission provided its alternative order be obeyed by the installation of reshipping at the complaining Georgia points. So we say this "varying difference" at Nashville is immaterial, because it was not before the Commission, was developed for the first time in the Commerce Court, and was not condemned, but indeed *ratified* by the Commission, provided a similar situation were produced by the installation of reshipping at the Georgia points.

III.

Assignments of Error V, VI and VII.

These assignments of error are not separately commented on by our adversaries. They have either already been disposed of in our treatment of Assignments I, II, III and IV, or they have now become without point since the recent decision of the Court in the case of *I. C. C. et al.* v. *L. & N. R. R.* (decided January 20, 1913), hereinbefore quoted.

Ante, pp. 10-13.

IV.

The Second Section of the Act Not Involved in the Case.

In the brief filed by the learned counsel for the grain dealers at the complaining Georgia points, there is no contention that Section 2 of the Act is material to be considered at all in this case. But in the brief filed by the learned counsel for the Interstate Commerce Commission, at pages 29-33 and pages 47-54, the view is presented that there was substantial evidence before the Commission tending to show that the reshipping practice at Nashville violated Section 2 of the Act.

It would seem to be sufficient answer to this contention to say that we are at least entitled to have the original judgment of the Interstate Commerce Commission upon this question of an alleged violation of Section 2 of the Act. The Commission did not so find. The Commission, of its own motion, suspended the first order and report entered in this case in 16 I. C. C. Rep., 590 (Trans., pp. 1071, 1072), and, after investigating the general subject of transit privileges (18 I. C. C. Rep., 280), the Commission made a rule upon the appellees herein to appear and show cause why the reshipping practice at Nashville should not be condemned as an undue discrimination against the complaining Georgia points; and in response to this rule, a hearing was had, voluminous testimony adduced at the hearing, and an *ex parte* investigation also made, as the Commission's answer filed in the Commerce Court reveals; and then the *final* order and report condemning the reshipping practice at Nashville was entered. This is the only order of the Commission enjoined by the Commerce Court, and the only order and report that could in any aspect of this case ever become effective. And the Commission concludes this final report with the following *finding* and *conclusion:*

> "After a careful consideration of all the pertinent facts and circumstances, we are of the opinion and find that the matters and things complained of herein constitute *the undue and unreasonable preference and advantage*, and the undue and unreasonable prejudice and disadvantage, as between the parties to this proceeding, *prohibited by Section Three* of the Act to Regulate Commerce, and an order will be issued accordingly."
> Trans., p. 1077.

It thus appears that the reshipping practice at Nashville has only been condemned as a violation of Section 3 of the Act, and this would seem to end any contention that Section 2 of the Act is involved at all.

But in no aspect of the case can Section 2 of the Act be applicable. For convenience, we quote the following excerpts from decisions with reference to the proper limits within which Section 2 may be applied.

In the case of *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S., 281, the Court said:

> "In order to constitute an unjust discrimination under Section 2, the carrier must

> charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. To bring the present case within the words of this section we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one. And in view of the universally accepted fact that a man may buy, contract or manufacture, on a large scale, cheaper proportionately than upon a small scale, this is impossible."

From the opinion in *Wight v. United States*, 167 U. S., 518, we quote the following:

> "It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other devices by which two shippers shipping *over the same line, the same distance, under the same circumstances of carriage*, are compelled to pay different prices therefor."

From the opinion in *Int. Com. Comm. v. Alabama Mid. Ry. Co.*, 168 U. S., 144, we quote as follows:

> "The second section prohibits special personal favoritism by secret devices."

And from the opinion of the Circuit Judges in the case of *Pearcy & Co. et al. v. U. P. R. R. Co. et al.*, 176 Fed. Rep., 409-423, we quote the following:

"The rate of transportation from points west of the Missouri River through the cities upon that river to St. Louis and other Eastern points, is the same to all shippers. All shippers are offered the option of sending their grain through these cities with or without elevation for the same price. The railroad company pays out of the amount it receives from this uniform rate, three-fourths of a cent per 100 pounds, to the elevator men at the river, for the elevation of that part of the transported grain which is elevated in transit there, in consideration of a prompt return and full use of its cars. It is insisted that this constitutes a rebate and an unjust discrimination because the net amount retained by the carrier is three-fourths of a cent less on grain elevated than on that which is not elevated, and because the shipper who elevates his grain receives a service that he who does not elevate it fails to obtain. But this is not a rebate, because there is no concession from the published rate here, but an allowance in accordance with that rate (section 2) and because the same service of elevation is offered to all shippers at the same price, and they are all able to accept it and there is neither rebate nor unjust discrimination where such an offer is made, although some accept and others reject its advantages."

And to show that the Commission understands Section 2 of the Act differently from the construction now sought to be placed upon it by its learned counsel, we quote the following from *Cattle Raisers' Assoc'n* v. *Ft. Worth Co.*, 7 I. C. C. Rep., 513-539.

"The single question is, therefore, Is this terminal charge of $2 imposed by the carriers whose lines enter the city of Chicago in violation of the Act to Regulate Commerce?

"The complainants insist that it does violate the second section of that Act in that similar charges are not imposed at other livestock markets where the conditions are substantially the same. This claim involves a misconception of the second section. That section of our Act corresponds to what is known as 'The Equality Clause' in the English act. That clause which was enacted before the 'Undue Preference Clause,' corresponding to our third section, provided, in substance, that railways should exact the same compensation for the same service from all persons. The intent of our second section is to prevent discrimination between individuals. It prohibits the rendering of a given service to one person for a less compensation than is exacted from some other person for the same service under substantially similar circumstances and conditions. There can be no violation of that section unless the services are 'like'. And in order to be 'like' within the meaning of that section they must be rendered at least over the same line. Assume, for instance, that some one of these defendants reaches both the city of Chicago and the city of Omaha. Now, if that line should absorb this terminal charge *in Chicago* in the case of one shipper and should decline to absorb it in the case of another shipper *from the same point*, that would be a discrimination under the second section, but if this line absorbed the terminal at Omaha and did not absorb it at Chicago,

> that could not work a violation of the second section, for a service of transporting to Chicago and the service of transporting to Omaha is not a like service within the meaning of that section. The second section can, therefore, have no application to the facts in this case."

If the Commission, in the case at bar, had found that the reshipping practice was an unlawful device whereby a grain shipper at Nashville, shipping grain to a Southeastern destination, was compelled to pay the local rate, while a grain reshipper at Nashville could ship grain to the same Southeastern destination in the same manner and at the same time, and over the same line, at a less transportation charge (the balance of the through rate), then Section 2 of the Act *might* be involved, provided the Nashville shipper were complaining of a discrimination against him and in favor of the Nashville reshipper. In such a case, however, before Section 2 would be violated, the Commission would have to find that the reshipping practice was a device unlawful in *substance*, and a mere cloak or scheme for giving to the reshipper the benefit of the balance of a through rate, when the service was not in point of fact a through service. This the Commission, departing from its order first entered in this case, finally refused to do.

Indeed, in the *Import Rate Case* (162 U. S., 197, 213, 214-219), the Court was asked to hold that it could be a violation of Section 2 of the Act for a rail carrier to charge more on a local shipment, say from New Orleans to San Francisco, than was charged on an exactly similar shipment, over the same line, of the same commodity, from and to the same points, where the commodity had reached New Orleans by ship from Liverpool under a through bill of lading to San Francisco. The Court declined to hold this to be a violation of Section 2 of the Act; and at the same time held that on account of a competitive situation existing with reference to ocean lines and rail lines not running between New Orleans and San Francisco, there had been no undue preference committed in violation of Section 3 of the Act; and we are unable to see why this decision does not establish that the reshipping practice at Nashville, under the undisputed testimony before the Commission, is no violation of either Section 2 or Section 3 of the Act.

In other words, Section 2 of the Act cannot be violated unless a carrier shows favoritism between two shippers shipping from and to the same points, over the same line, in the same way.

This is bound to be the sound construction of Section 2, for otherwise there would be no room for the application of Section 2 without destroying the present settled construction of Section 3 of the Act. It is entirely well settled that the extraneous effect of competition is to be excluded in an application of Section 2.

I. C. C. v. *Alabama Mid. Ry. Co.*, 168 U. S., 144, 161, 166;

I. C. C. v. *Delaware L. & W. R. Co.*, 220 U. S., 235;

I. C. C. v. *B. & O. R. R.*, 225 U. S., 342.

And if Section 2 of the Act can be applied to a case involving any other shipments than those from and to the same points—that is, to any shipments involving competitive situations at different markets—then Section 2, with reference to the application of which competition is immaterial, would devour Section 3 of the Act, the application of which, by settled construction, is dependent largely upon differing competitive conditions prevailing at different points.

And if Section 2 can be applied in any aspect to the case at bar (a thing the Commission did not undertake to do), all discussion with reference to water competition at Nashville would be wholly foreign to the present case. This, we say, demonstrates not only the impossibility of any application of Section 2 in the case at bar, but demonstrates that the Commission has never undertaken to condemn the reshipping practice at Nashville as any violation of Section 2 of the Act.

V.

The Commission's Alternative Order in this Case Can, Upon No Theory of the Case, be Sustained Against the Carriers Named Therein.

It is shown in the petition filed by the Louisville & Nashville Railroad Co. and the Nashville, Chattanooga & St. Louis Ry. in the Commerce Court (Trans., pp. 65-73); and admitted in the Answer of the Interstate Commerce Commission filed in the Commerce Court (Trans., pp. 112-118);

and it is admittedly true (Brief on behalf of the Interstate Commerce Commission, p. 3) that the lines of the L. & N. R. R. and the N., C. & St. L. Ry. reach *but two* of the complaining Georgia points, and do not extend *southward* from any of these complaining Georgia points.

It is, therefore, admittedly true that the reshipping practice could not be installed at any of the complaining Georgia points without the concurring action of the southern connections of the two Nashville lines, because these connections alone would handle the grain reshipped at any of the complaining Georgia points.

So it results that a question, under any aspect of the case at bar is, whether, under the Third Section of the Act, the Southeastern connections of the Nashville lines, which alone haul grain from the complaining Georgia points to Southeastern destinations, and which do not reach Nashville with their lines, and which have no connection with the reshipping practice at Nashville other than being parties to reasonable through rates with the Nashville lines, can be guilty of any undue or unlawful discrimination against these complaining Georgia points by declining to there extend reshipping practices, similar to the reshipping practices extended by the Nashville lines at Nashville. And, stated differently, can the Nashville lines by extending the reshipping practice at Nashville, be guilty under the Third Section of the Act of an undue discrimination against each and all of the ten complaining Georgia points, only two of which are reached by the Nashville lines, and south of none of which the Nashville lines extend at all—simply by reason of the fact that their connecting lines have failed to extend reshipping practices at the Georgia points similar to the reshipping practices extended by the Nashville lines at Nashville?

We say the negative of this question is in effect ruled by the case of *Penn Refining Co. v. West. N. Y. & P. R. R. Co.*, 208 U. S., 208-225.

In the above case, the West. N. Y. & P. R. R. Co., as an *initial carrier*, hauled oil from certain oil fields near Titusville and Oil City, Pennsylvania, to Buffalo, New York, where said oil was received by the Lehigh Valley Railroad as a *connecting carrier*, and hauled from Buffalo to Perth Amboy. It had been insisted in the above case, before the Commission, and the Commission had so held, that said carriers had been guilty of undue discrimination against certain oil operators at Titusville and Oil City who shipped oil in barrels, by the giving of a preferential rate to other oil shippers who shipped oil in bulk in oil tank cars. Said carriers charged shippers in barrels for the transportation of the barrels at the same rate applied to the oil, while these carriers did not charge shippers in bulk for the weight of the tank car, but only for the weight of the contents of the tank.

The Commission had entered an order in the *alternative*, directing the carriers to desist from collecting any sum for the transportation of the barrel package itself, or, on reasonable notice, to promptly furnish tank cars to complainants and other shippers who might apply therefor.

The Court, speaking through Mr. Justice *Peckham*, in the above case, which was a suit for reparation growing out of said order, first held that the *alternative* nature of the order *was equivalent* to a holding that the charge for the weight of the barrel package of oil was not excessive. The Court then held that the defendant carriers had not been guilty of any undue discrimination in the matter complained of, and were not liable to make any reparation to plaintiffs upon any such ground.

With reference to the Lehigh Valley Railroad, which was not the initial carrier at Titusville and Oil City, Pa., but which was only a connecting carrier handling the oil from Buffalo to Perth Amboy upon a reasonable through rate with the initial carrier, the Court held that the Lehigh Valley Railroad could *in no event*, as a mere connecting carrier, be held guilty of any undue discrimination. In this connection the Court said:

> "There are *other reasons in addition to the foregoing* why the Lehigh Valley should not be held for any *discrimination* in this case. *That* company was *but a connecting carrier* and took the cars as they were delivered to it by the *initial carrier* at Buffalo for transportation to Perth Amboy. It was the *duty of the connecting carrier to do so*, and it was not rendered liable for any alleged wrongful act of the initial carrier *merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy*, which was *in itself reasonable*. Nor did the Eighth Section of the Commerce Act render it liable for any such alleged *wrongful act* asserted against the *initial carrier*." (Italics ours.)
>
> 208 U. S., 221, 222.

We submit that the above holding is conclusive of any aspect of the case at bar.

In the case at bar, just as in the case above cited, the Commission entered an *alternative* order, which is *equivalent* to a holding that the through rates protected and applied at Nashville by the reshipping practice there extended, are reasonable rates. The only relation that the Southeastern connections of the Nashville lines maintain to the reshipping practice at Nashville grows out of the simple fact that these Southeastern connections have performed their duty under the law in becoming parties with the Nashville lines to through rates which the Commission finds are reasonable.

And these Southeastern connections can no more be held guilty of an undue discrimination for declining to install reshipping at the complaining Georgia points, than could the connecting line in the case above quoted be held liable in reparation for an undue discrimination committed by the initial carrier, with which the connecting line sustained no relation except being a party with the initial line to a reasonable through rate, as the connecting line was under the legal duty to do.

Our adversaries insist that these Southeastern connections of the Nashville lines, by being parties to a joint tariff and a reasonable through rate with the Nashville lines, are to be held jointly guilty with the Nashville lines of an undue discrimination, if these conections do not install the reshipping practice at the complaining Georgia points. This seems to be the same view expressed in the *dissenting* opinion of *Mr. Justice Moody* in the 208 U. S. case, above referred to, as follows:

> "Nor do I see any reason why the Lehigh Valley Railroad should not be held responsible. It had, with the other defendant, established a joint tariff for a continuous shipment between the States. That tariff has been found to be discriminatory and unlawful. It has received its share of the unlawful exaction. The Eighth Section of the Act provides that a carrier who 'shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful,' shall be liable to the full amount of the damages sustained by one injured thereby. I see no escape for this defendant from this provision."

And in the recent *Elevation Allowance Cases*, *Mr. Justice Holmes*, speaking for the Court, reaffirmed the views expressed by the majority opinion in the case of *Penn Refining Co. v. West. N. Y. & P. R. R. Co.*, 208 U. S., 208-221, and said:

> "We agree with the Court below that this decision" (of the Commission), "is erroneous in its conception of the *grounds* on which under the statute an advantage may be pronounced *undue*, and in its assumption that Congress has left the matter open by *merely permissive* words. The principle as to advantages is recognized in *Penn Refining Co. v. Western New York & Pennsylvania R. R. Co.*, 208 U. S., 208, 221. *The law does not attempt to equalize fortune, opportunities or abilities.*"
>
> 222 U. S., 46.

We say that by performing their duty and becoming parties to reasonable joint through rates, connecting carriers cannot, under Section Three of the Act, be treated as parts of the same railroad system, and each held guilty of every discrimination committed by the other. That the Interstate Commerce Commission does not so treat and regard connecting carriers, is manifest from two of its recent decisions.

In the recent case of *Ashland Fire Brick Co.* v. *Southern Ry. Co.*, 22 I. C. C. Rep., 115, decided December 11, 1911, the Commission said:

> "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as a part of one great whole, apportion to each a certain territory, or to require all to meet upon a common basis at all points."

In the still more recent case of *Board of Railroad Commissioners of the State of Kansas* v. *A., T. & S. F. Ry. Co.*, 22 I. C. C. Rep., 407, decided February 5, 1912, the Commission said:

> "Our conclusion is that in the main rates from Detroit to St. Louis do not unduly discriminate against the Kansas producer, but assuming that they do, can the Wabash Railroad be properly required to correct that discrimination? We do not think that it should be, for the reason that this carrier does not bear such a relation to the rates from Hutchison to St. Louis that it should be properly held responsible for whatever discrimination may exist in the present relation."

Conclusion.

For all the reasons herein given, we respectfully submit that the decree of the Commerce Court annulling the Commission's order in question, should be affirmed.

Respectfully submitted,

Jno. A. Pitts,
K. T. McConnico,
Solicitors for the Nashville Grain Exchange and the Nashville Board of Trade.

Office Supreme Court, U. S.
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No. ~~306~~ [redacted] 39

October Term, 1912

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA, *et al.*,
Appellants,
versus
LOUISVILLE & NASHVILLE RAILROAD CO., *et al.*,
Appellees.

APPEAL FROM UNITED STATES
COMMERCE COURT.

Statement, Brief and Argument in Behalf of Appellants W. S. Duncan & Company, *et al.*

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January 1, 1913

Appeal Pub. Co., Atlanta, Ga.

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Louisville & N. R. Co. et al, v. United States, et al, 197 Fed. Rep. 58, Transcript p. 1101.

IN THE

Supreme Court of the United States

No. 706, October Term, 1912

THE UNITED STATES OF AMERICA, *et al., Appellants,* *vs.* LOUISVILLE & NASHVILLE RAILROAD CO., *et al., Appellees.*	**Appeal from United States Commerce Court**

Brief and Argument in Behalf of W. S. Duncan & Company, et al., Appellants

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STATEMENT.

This case involves the right and power of the Commerce Court to annul and set aside an order of the Interstate Commerce Commission upon the ground that, in the opinion of the Court, certain undisputed facts compelled a conclusion contrary to that arrived at by the Commission on all of the facts. The question is whether the Court has the jurisdiction to determine as a matter of law that the Commission exceeded its power in not regarding certain facts as being so dominant and controlling as to be conclusive of the controversy.

A number of wholesale dealers in grain, grain products and hay doing business in Atlanta and other Georgia cities made complaint to the Interstate Commerce Commission that the privilege of reshipping accorded by the railway lines to Nashville and denied to the

Georgia cities constituted an undue preference in favor of Nashville, and created an unjust discrimination against the complaining points, in violation of Section 3 of the Act to Regulate Commerce.

The affected carriers sought to justify the preference upon the grounds (a) that Nashville was a primary grain market, and as such entitled to the transit privileges usually accorded such markets; (b) that the practice of rebilling at Nashville was originally compelled and its continuance is justified by the competition of the Cumberland River; and (c) that transit privileges were accorded Nashville in order to equalize it with Ohio River cities, and thereby meet the competition at those points in the haul of grain to the Southeast.

A full and fair hearing was had before the Commission on these and all other matters involved in the complaint; and subsequently another hearing was had at which the evidence adduced by the railway companies and by the Nashville Grain Exchange was principally directed to showing the force of the competition of the Cumberland River as affecting the practice of rebilling. After due consideration of all the facts and circumstances of the case, the Commission found and concluded; (a) That Nashville is not a primary grain market; and that the practice of rebilling was not established on that theory; (b) That the competition of the Cumberland River does not justify the practice of reshipping at Nashville; (c) That under all the facts and circumstances of the case, the preference accorded Nashville was undue and the discrimination against the complaining cities was unjust.

The Commission ordered the discontinuance of the practice of reshipping at Nashville, unless the carriers should extend a like privilege to Atlanta and other complaining points.

Under the privilege of reshipping as practiced at Nashville dealers in that city are permitted to ship in grain, grain products and hay from the Ohio and Mississippi river crossings at the local rate; unload, elevate, inspect, weigh and grade the grain; and at any time within six months thereafter to reship the grain or its products in any quantity to destinations in the Southeast at a total freight charge equaling the through rate from the river crossings to the ultimate point of destination. In other words, detention and transit privileges are allowed at Nashville, not on the basis of the combination of rates into and out of Nashville proper, but under a protection of the through rate. Similar privileges are denied to Atlanta and other Southeastern cities. The result is that the dealer in Atlanta, desiring to stop the shipment for inspecting, weighing, grading and sacking is required to pay the full combination of rates, which is materially in excess of the through rate that the Nashville dealer is required to pay on shipments of the same origin to the same destinations. Thus from the Ohio River to Griffin, Ga., 43 miles South of Atlanta, the freight charge to the Nashville dealer is 3 cents a hundred pounds less than to the Atlanta dealer, each handling the grain over the same routes and in the same manner.

The Commerce Court considered the crucial question to be whether the railway companies serving Nashville were compelled to extend the reshipping privilege to grain dealers at Nashville in order to successfully compete in the transportation of grain, grain-products and hay with the boats on the Cumberland River. The Court thought that this question of fact was decisive of the controversy; and that if the carriers were so compelled to establish reshipping at Nashville because of river competition; "then the law of the land declares that the granting of the privilege to Nashville and not to Atlanta, where no such competition existed, would not be a violation of Section 3 of the Act to Regulate Commerce."

The ground and substance of the decision of the Commerce Court appears in the following extract from the opinion:

> "We may not annul the order for the reason, if it be so, that Nashville ought to be classed and equalized with Mississippi and Ohio river crossings, nor may we annul it for the reason that Nashville is a natural concentration point or primary market for grain, if it be so, nor on the ground that Nashville is the proper place for stoppage of grain in order to protect the grain itself by handling and drying. We must annul the order, if at all, upon the ground that upon the undisputed facts the law declares that there is no violation of section 3 of the act to regulate commerce. We think that the undisputed facts demonstrate that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River, and on that account alone, and that the undisputed evidence would not support any other finding upon that proposition."

Louisville & Nashville R. Co. v. United
States. 197 Fed. Rep. 58, 63;
Transcript, p. 1101, 1106.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows:

I.

The Commerce Court erred in holding "that upon the undisputed facts the law declares that there is no violation of Section III of the act to regulate commerce."

II.

The Commerce Court erred in holding that upon the admitted facts the finding and conclusion that undue or unreasonable preference or advantage existed as to Nashville, and that undue or unreasonable prejudice or disadvantage existed as to the Georgia cities named in the order, was a question of law.

III.

The Commerce Court erred in substituting its judgment for the judgment of the commission upon the question whether the admitted discrimination in favor of Nashville and against the Georgia cities named in the order, on account of the practice of rebilling and reshipping at Nashville, was an undue or unreasonable preference or advantage to Nashville, and an undue and unreasonable prejudice or disadvantage to the said Georgia cities.

IV.

The Commerce Court erred in holding that water competition at an intermediate point in a through route gave the carriers a legal right to maintain a practice of stopping, unloading and within six months rebilling and reshipping the traffic upon through rates, at such intermediate point, although the Interstate Commerce Commission had determined that said rebilling and reshipping privilege granted at one intermediate point while the the carriers refused to grant such privilege to other intermediate points named in the order, gave an undue and unreasonable preference and advantage in favor of the intermediate point at which the privilege was granted, notwithstanding the alleged water competition at said intermediate point.

V.

The Commerce Court erred in overruling the motion to dismiss the petition made by the respondents W. S. Duncan & Company et al., for the reasons set forth in said motion.

VI.

The Commerce Court erred in not dismissing the petition of the petitioners.

VII.

The Commerce Court erred in annulling the order of the Interstate Commerce Commission referred to in the petition. Trans. p. 111.

Among the grounds of the motion to dismiss the petition filed in the Commerce Court by W. S. Duncan & Company, et al., the overruling of which motion is excepted to in the fifth assignment of error above, are the following:

> "Because whether a discrimination is unjust is a pure question of fact, the determination of which with respect to the practices of common carriers engaged in interstate commerce, is by law committed exclusively to the Interstate Commerce Commission, whose opinion with respect thereto and decision thereof forecloses judicial investigation.
>
> "Because in determining that the practice of rebilling as permitted at Nashville constituted an unjust discrimination as against Atlanta and other Georgia cities the Interstate Commerce Commission proceeded in the exercise of administrative power that had been lawfully conferred upon it by appropriate action of Congress, and its action in this regard is not open to review in the Courts on the question of fact involved.
>
> "Because whether the circumstances and conditions at Nashville are so substantially dissimilar to those existing at Atlanta and other Georgia cities as to justify the preference accorded to Nashville in the matter of rebilling, is a question of fact committed by law exclusively to the determination of the Interstate Commerce Commission.
>
> "Because the courts are without power to invade the administrative functions vested in the Interstate Commerce Commission; and can not set aside an order duly made by it, even though the court upon similar consideration may arrive at a different conclusion; judicial inquiry being limited to the power of the commission to make the order, and not the expediency or wisdom of having made it."

The grounds of the motion above set out appear at page 137 of the transcript.

ARGUMENT.

I.

Whether a discrimination is justified by dissimilarity of conditions is a question of fact, the determination of which is within the competency of the Interstate Commerce Commission.

In the proceeding before the Commission the defendant railway companies and the Nashville interveners sought to justify the admitted discrimination by showing dissimilarity in circumstances and conditions. It was claimed that this dissimilarity existed because Nashville was a primary grain market and was situated upon a navigable stream, the competition of which compelled the establishment of rebilling and entitled Nashville to be equalized with Ohio River cities in the matter of this grain traffic.

Whether such dissimilarity existed as justified the preference and rendered innocuous the discrimination was a question of fact to be determined by the Commission in light of all the facts and circumstances of the case.

The reasonableness and justness of a rate is a question of fact, depending for its determination upon many considerations and involving the exercise of judgment and discretion.

Illinois Central R. Co. vs. Interstate Commerce Commission, 20~~2~~6 U. S., 441;
Texas & Pacific R. Co. vs. Interstate Commerce Commission, 162 U. S., 197;
Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S., 184;
United States vs Trans. Mo. Freight Assn., 166 U. S., 290.

Whether a discrimination is unjust or a preference undue, is likewise a question of fact peculiarly within the province of the Interstate Commerce Commission, an expert tribunal appointed by law and informed by experience.

> Illinois Central R. Co. vs. Interstate Commerce Commission, 206 U. S., 441;
> East Tenn. V. & G. R. Co. vs. Interstate Commerce Commission, 181 U. S., 1;
> Louisville & Nashville R. Co. vs. Behlmer, 175 U. S. 648.

In the case of Texas & Pacific R. Co. vs. Interstate Commerce Commission, 162 U. S., 197, it was said:

> "The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue were questions of fact to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence."

The determination of the question is committed exclusively to the Interstate Commerce Commission. The Fifteenth Section of the Act to Regulate Commerce, as amended by the Hepburn Act, provides that whenever after a full hearing the Commission "shall be of the opinion" that any regulation or practice of the carriers affecting rates is unjustly discriminatory or unduly preferential or prejudicial, it shall determine and prescribe the just, fair and reasonable practice thereafter to be observed, and shall order the discontinuance of the practice condemned to the extent to which the Commission may find it to be in violation of the Act.

Under the law prior to the Hepburn Act the Commission was required to set out its findings of fact, which were made prima facie evidence in subsequent judicial proceedings. Under the law as amended, the Commission now proceeds to an opinion on the facts and makes its report in writing setting out its conclusions together with its decision, order or requirement in the premises. Unlike the findings of fact which were only prima facie evidence, the conclusions of the Commission on questions of fact are no longer subject to judicial review.

In cases like that at bar the only question presented to the Commission for consideration and determination is whether the discrimination complained of is unjust, and its opinion duly expressed in its report and order, is final; unless the Commission has exceeded the limitations upon its power as declared in the statute and as defined by this Court.

Interstate Commerce Commission vs. Illinois Central R. Co., 215 U. S. 452;
Interstate Commerce Commission vs. Union Pacific R. Co. 222 U. S., 541;
Baltimore & Ohio R. Co. vs. Pitcarn, 215 U. S., 481;
Interstate Commerce Commission vs. Chicago, Rock Island & Pac. R. Co. 218 U. S., 88

In this case, the Commission could not have appropriately exercised the jurisdiction conferred upon it without deciding whether the discrimination complained of was just or unjust. In this respect it is totally unlike the Willamette case, 219 U. S., 445. In that case the Commission predicated its decision upon a pure question of law without deciding the questions of fact essential to the exercise of its jurisdiction.

In the case at bar there is no contention that the Commission based its conclusion upon any erroneous principle of law. The claim is that the Commission did not give sufficient weight to certain facts which are said to have been undisputed and which it is insisted are dominant and controlling. The excess of power, of which the Commission was convicted by the Commerce Court, consisted in taking a different view of the weight of the evidence from that entertained by the Court respecting the nature and effect of the competition of the Cumberland River at Nashville. The Commission was of the opinion that this competition did not justify the discrimination; the Commerce Court thought that the undisputed facts demonstrated that rebilling at Nashville was wholly caused by this competition, and that this fact was of such overwhelming importance as to justify the discrimination as a matter of law. In other words, in view of all the facts the Commission was of the opinion that the discrimination was unjust; the Commerce Court, because of certain facts which it thought were undisputed and controlling, arrived at a different conclusion.

In a judicial proceeding where all of the facts are admitted the legal effect of those facts becomes a question of law. Where, however, in an administrative investigation involving many facts, some of which may appear to be undisputed, the Court is not permitted to say that these facts control the decision of the case as a matter of law.

That Nashville is situated on the Cumberland River, and that the stream is navigable for a large part of the year, are physical facts which can not be denied. The effect of this competition, however, and its influence in compelling and sustaining transit privileges at Nashville is quite another matter, as to which the Commission arrived at a different conclusion from the Court. The fact of the existence of a navigable stream at Nashville, together with the character and extent of the competition thereby afforded, was duly considered by the Commission, and given the weight to which that tribunal thought it was entitled. This is all that the law requires in this regard.

In a series of cases the Commission construed the Fourth Section of the Act to preclude consideration of competition at the more distant point in the making of rates, unless with the previous assent of the Commission. This misconstruction of the Act was corrected in the cases referred to, wherein this Court said that the fact of competition should be taken into consideration, and that if this competition was found to be controlling upon the traffic and rates it constituted that dissimilarity in circumstances and conditions provided for in the Act.

In the case of Illinois Central R. Co. vs. Interstate Commerce Commission, 206 U. S., 441, several of these cases are reviewed, and the Court speaking through Mr. Justice McKenna declared:

> "In all these cases therefore there was a single distinct and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power."

In the case of Cincinnati, N. O. & T. P. R. Co. vs.

Interstate Commerce Commission, 162 U. S., 184, it was argued that the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rate charged. The question was whether competitive conditions should be considered by a railroad in fixing the greater charge for a shorter than a longer distance on its own line. This Court said that the question was one of fact peculiarly within the province of the Commission.

So in the cases of Texas & Pacific R. Co. vs. Interstate Commerce Commission; Interstate Commerce Commission vs. Alabama Midland R. Co., 168 U. S., 144; Louisville & Nashville R. Co. against Behlmer, 175 U. S., 648; this Court declared that competition was a factor to be considered, and that in excluding it the Commission fell into an erroneous construction of the Act.

In all these cases the Commission misconstrued its duties and powers under the Fourth Section of the Act, and in each case held that the existence of competition at the more distant point could not be taken into consideration by the carrier in fixing rates, without the previous assent of the Commission.

Great reliance is placed by opposing counsel on certain expressions contained in the opinion of this Court in the case of East Tenn. V. & G. R. Co. vs. Interstate Commerce Commission, 181 U. S., to the effect that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstances and conditions which the carrier has a right to take into view in making rates to the competitive point:

"That is to say, that the dissimilarity of circum-

> stance and condition pointed out by the statute, which relieves from the long and short haul clause, arises from the command of the statute, and not from the assent of the Commission; the law, and not the discretion of the Commission, determining the right of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action was predicated was wrong."

In that case the Commission found that the exceptional rate to Nashville was not caused by water competition, but was exclusively the result of the action of the Louisville & Nashville Railroad Company in extending trunk line rates from Cincinnati to Nashville; and that it was absolutely necessary for the Southern carriers to meet this competition, or retire from the traffic. Nevertheless the Commission held that the carriers had no lawful right to consider and meet this controlling competition without the previous assent of the Commission. The Commission refrained from passing upon the reasonableness of the rates per se, or the discrimination that might be produced by them, but confined its consideration to and based its order upon a technical and erroneous construction of the Act. The Court said that taking into view the terms of the order and the reasons given by the Commission for considering only one aspect of the case and excluding all others, it is obvious that the Commission construed the Act to mean that, however controlling the competition might be, the dissimilarity of circumstances and conditions contemplated in the Fourth Section could not be produced or availed of without the previous assent of the Commission. Speaking through the present Chief Justice, the Court said:

> "This in substance but decided that the dissimi-

> larity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the Commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the Commission."

There is nothing in that case which is authority for the proposition, acted on by the Commerce Court, that after the Commission had considered the competition and determined that it was not controlling on the traffic and practice involved, the Court had the right to arrive at a different conclusion as to the effect of the evidence. The question whether the competition is so real and substantial as to be controlling is not a question of law for the Court, but is eminently a question of fact for determination by the Commission. There is here no claim that the Commission refrained from fully exercising the jurisdiction vested in it. Even under the law prior to the Hepburn Act, when the findings of fact of the Commission were only prima facie evidence in subsequent judicial proceedings, this Court has steadily refused to weigh the evidence or exert its original judgment on the facts. Now that the findings of the Commission on the evidence are conclusive, a judicial review of such findings is foreclosed.

II.

There is substantial evidence in the record upon which to predicate the opinion and sustain the order of the Commission.

The Commerce Court thought that the crucial question was whether the rail lines were originally compelled to establish reshipping in order to meet the river competition; and that it had the power to annul the order upon the ground that the undisputed facts demonstrated the error of the Commission in its ultimate finding that the force of this competition does not now justify the discrimination.

The evidence is not undisputed that the privilege was originally accorded Nashville solely because of the competition of the Cumberland River. While there is some testimony in the record to this effect, and it is nowhere categorically denied, there are other facts and circumstances indicating that the real object of the rail lines was to equalize Nashville with the Ohio and Mississippi River crossings and thereby secure a larger participation in the movement of the grain traffic from the Northwest into the Southeast; and the record makes it plain that this object was attained.

The argument of the testimony in behalf of the carriers is that because of its location on the Cumberland River Nashville was a primary grain market, and as such entitled to be equalized with other primary markets on the great rivers; and that in order to accomplish this, transit privileges were accorded Nashville.

There is much evidence that Nashville was a primary grain market, and for that reason entitled to transit privileges in order to equalize her with other primary markets. Trans. pp. 595, 596, 611, 636, 670, 835, 590, 813, 814, 827. Mr. Compton, Freight Traffic Manager of the Louisville & Nashville Railroad Company, testified that all the Nashville lines have done by establishing reshipping arrangements at Nashville is to place Nashville on a parity with other gateways and primary markets, such as those located on the Ohio River. Trans. p. 827.

Mr. Horace Smith, Vice-President and Traffic Manager of the Nashville, Chattanooga & St. Louis Railway, speaking of these transit privileges, with direct reference to elevation, says that if the Nashville man buying in Nebraska and the West and shipping direct should be denied the transit privileges he could not compete with the dealer at the Ohio River cities who buys in the same district and is allowed these privileges. "Nashville would be at a disadvantage to that extent; and the object was simply to equalize it. The equalization is as near as I can discover an exact one." Trans. p. 630.

In order to make reshipping at Nashville effective, it was necessary to secure the co-operation of the rail lines south of Chattanooga. These lines gave their consent and shared in the expense of maintaining the practice. Trans. pp. 705, 706, 709. Since these lines would have participated in the movement from Nashville to the Southeast, whether the grain came into Nashville by river or rail, it is manifest that the primary thought inducing their concurrence was the attracting a larger movement from the Northwest through Nashville by means of these transit privileges, and not the meeting of the Cumberland River competition. If therefore the fundamental purpose was to equalize Nashville with other markets and thereby secure a larger movement through Nashville, the control of the river competition was merely an incident to the accomplishment of an end. Consistently with these facts the Commission held that "the privilege was particularly intended to take care of the through movement from the Northwest." Trans. p. 1073.

The granting of these immensely valuable privileges to Nashville was not so much a matter of grace as of self-interest on the part of the rail carriers. Kissing goes by favor. The thought was to build up the business of distributing grain into the Southeast from Nashville, and to strengthen the dealers thereby giving them this trade advantage so that they would buy in a larger quantities from the west for shipments into and out of Nashville over the lines of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis Railways.

The original purpose inducing the establishment of reshipping at Nashville, so far from being controlling, is really of minor importance. The true question is whether the privilege now operates to produce an undue preference in favor of Nashville and an unjust discrimination against Atlanta and the other complaining cities However innocent may have been its origin, it is the effect of the practice as to which we are concerned. To this question the Commission gave great consideration and arrived at a deliberate judgment. It gave due recognition to the fact that the existence of the Cumberland River creates a condition which has been reflected in freight rates and adjustments to Nashville, and declared it to be important to inquire just what effect the river has upon the particular traffic involved. It is pointed out that the carriers have not reduced the rates to Nashville in competition with the river; nor have reductions been made in the rates from the Ohio and Mississippi crossing to the Southeast, nor from Nashville to the Southeast.

The reshipping plan seems to have pretty well destroyed river competition without affecting these charges.

> "At the same time, by the adoption of the reshipping privilege at Nashville, commercial preference and advantage have been accorded the interests there engaged in supplying the immense territory to the Southeast with its increasing consuming power. In other words, the present adjustment promotes both the local and the through grain business and adroitly keeps the line of cleavage between them clear and distinct. The grain moving into Nashville locally, via the river and otherwise, can hardly compete with the through business to the Southeast under the present tariffs, and grain moving into and out of Nashville under the transit privilege can not very well compete with the local industry. This twofold adjustment leaves little more that could be done to put Nashville on an advantageous basis as compared with all rivals in that territory." Trans. pp. 1074-75.

On this subject Mr. Compton testified:

> "Therefore, the establishment of the reshipping arrangements at Nashville (was) for such grain as originated at and north and west of the various Ohio and Mississippi River crossings and as (was) brought into Nashville for the purpose of reshipping to the South, but it incidentally had the effect to a large extent of driving the boats out of competition for such of said grain as was intended for Nashville local consumption, and through this latter result the railroads were and are able to maintain higher rates on grain from the various Ohio and Mississippi River crossings to Nashville, Tennessee, proper when consumed locally than they could otherwise charge." Trans. pp. 813-14.

The Commission found that practically all of this immensely valuable through business from the Northwest to the Southeast has been absorbed by the adoption of reshipping. Indeed the Commission shows that as to this through traffic the river is not a factor to be reckoned with. The Commission on this point says:

> "In fact, under present conditions, with the cost of transhipment from rail to river and from river to rail, this water competition is greatly nullified. Furthermore, there seems to be nothing connected with this privilege in its actual practice in this country which makes it dependent upon location upon navigable waters. In fact, but an insignificant portion of the total number of points where it is practiced are so located, and many cities north and west of the Ohio and Mississippi rivers enjoy the privilege either as a primary or distributive market, irrespective of location upon navigable waters or of other competitive conditions." Trans. p. 1075.

The evidence justified these findings. Mr. Compton at pages 812-813 of the transcript, testified as follows:

> "Suppose a grain dealer located in Nashville should desire to sell a given amount of grain in Atlanta, Georgia, in competition with a dealer located at some other market, such as Cairo, Illinois, for instance, and suppose that both brought their grain through Cairo.
>
> "On the basis of present tariffs the rate from Cairo to Atlanta on grain is 24 cents per hundred pounds; the rail rate from Cairo to Nashville is 10 cents per hundred, and the rate from Nashville to Atlanta is 17 cents per hundred pounds. If the Nashville shipper brought his grain into Nashville from Cairo by river, he would be compelled to pay the cost of the transfer plus the boat or barge

charges at Nashville, plus the cost of transferring the grain from the wharf at Nashville to the elevator, warehouse or depot at Nashville, plus the Nashville proper rate of 17 cents per hundred pounds to Atlanta, and the total aggregate charges so arrived at would under present conditions be perhaps in excess of the Cairo to Atlanta rate of 24 cents per hundred pounds, which his competitor shipping direct would pay. If, on the other hand, he shipped his grain into Nashville from Cairo or beyond by rail and later shipped it to Atlanta, he would receive through the reshipping arrangements the benefit of identically the same freight rate as his Cairo competitor receives, and would, therefore, be in a position to compete on an equal basis with the Cairo dealer for the sale of the grain in Atlanta.

"Under these circumstances, he would naturally prefer to use the railroads rather than the rivers.

"Again, a Nashville shipper using the river from Cairo to Nashville would be under a like disadvantage in competing with another Nashville shipper using a railroad from Cairo to Nashville. Even were the total charges which the Nashville shipper using the rivers would be compelled to pay on the through movement of his grain from Cairo to Atlanta, as low as or less than the total charges which his competitor at Cairo shipping direct to Atlanta, or his competitor at Nashville shipping by rail from Cairo to Nashville and thus obtaining the benefit of the Cairo to Atlanta rate, on reshipment to Atlanta, would pay, he would still be at the same disadvantage because of the quicker transit and superiority of service which his competitors using the railroads would enjoy."

Water competition has but little if anything to do in determining whether transit privileges shall be allowed at a given point. Economic considerations and the supposed benefit to the carriers, to the trade, and to the public, are the predominant inducements. The useful purposes served by the establishment of concentration points and according them transit privileges are: (a) that an opportunity may be given for weighing, inspecting, cleaning, grading and sacking or milling grain in transit; (b) that the grain and its products may be accumulated and held in storage at points convenient to consuming markets from which these markets may quickly draw their supplies in accordance with their varying demands; (c) that the freight charges by different routes may be equalized, thereby promoting competition between markets; (d) that industries are thereby distributed and not concentrated at the terminal or rate breaking point. Trans. pages 995-6, 1003, 1020, 1018-1031, 1037-1038.

Whatever may once have been the actual or potential force of the competition of the Cumberland River it is not now nor can it again become so real and substantial as to exercise a controlling influence on the traffic and privilege here involved. This is demonstrable by a simple test.

The complete and permanent disappearance of navigation on the Cumberland River would have no effect upon the practice of reshipping. The grain brought into Nashville by boat—principally corn—is confined to that locally grown in the valleys of the streams navigated, not conveniently accessible to rail outlet. This grain is not entitled to reshipping privileges. Trans. pp. 596, 776, 1073. There being no movement of grain by the river for Southeastern shipment the destruction of that navigation would add nothing to the amount of grain entitled to the privilege. The through rates from the Ohio River to the Southeast would not be influenced, because those rates were never depressed on account of river competition; and the same is true with respect to the local rates into and out of Nashville. The rail lines would continue to compete for the traffic at the Ohio and Mississippi river crossings in the same way and to the same extent as now; and the same reasons of expediency would cause the continuance of the privilege at Nashville.

Neither would the withdrawal of the privilege appreciably increase the movement by river. So far as the local movement to Nashville is concerned, exactly the same competition as now exists would continue. Certainly the rail rates into Nashville would not be increased; and should they be lowered the boats would doubtless be deprived of the little traffic they now enjoy. With respect to the through traffic from the Northwest into the Southeast it is apparent that none of this would or economically could move by rail to the river crossings and thence by river to Nashville with another transfer from river to rail for further shipment. Trans. pp. 812-13, 1075.

Since the complete elimination of all river competition would have no influence upon the practice of reshipping, and the withdrawal of this privilege would have no appreciable effect upon the river traffic, it is manifest that the one can have no compelling influence upon the other, and that the finding of the Commission in this regard is abundantly sustained.

The Commission said that with respect to the particular traffic there are many characteristics of similarity between Nashville and the complainant cities that are obvious and predominating. They are all located in a section which consumes a portion of the excess of grain and its products produced in a more or less distant part of the country. "Both Nashville and the complainant cities are close to the consumers and the testimony is that they are in strong competition for even the smallest trade of the retailers and the consumers." Trans. p. 1075.

Upon the whole case the Commission found and concluded as follows:

> "While admitting much that is to be said in favor of Nashville, and appreciating the zeal and persistency with which her natural advantages of location have been presented for our attention, we find that in the light of comparison with the other cities in the Southeast Nashville is not so dissimilarly situated with respect to this particular traffic as to entitle it to be singled out and exclusively granted the important and extremely valuable privileges denied to its competitors. It seems to us remarkable and unusual that the carriers, in their tariffs, should have preferred one of these points to another in the handling of this profitable business. That their tariffs are contrary to the provisions of the statute we have no doubt, as we do not find anywhere in the record a substantiation of the existence of such conditions of dissimilarity at Nashville as would justify giving the sanction of the Commission to an adjustment which accords these very valuable privileges to one city of the Southeast and denies them to every other city south of the Ohio River and east of the Mississippi." Trans. p. 1077.

In adverting to some of the facts it has not been our intention to discuss the merits of the case before the Commission further than to demonstrate that there is substantial evidence in the record to sustain the order of the Commission. The purpose is to bring the case within the ruling of this Court in the Union Pacific case, 222 U. S. 541, 547, wherein it is stated that the Court confines itself to the ultimate question as to whether the Commission acted within its power; and with reference to the opinion of the Commission on the questions involved the Court, speaking through Mr. Justice Lamar, said:

> "Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such varied public interests can be supported by a mere scintilla of proof, but the Courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

However cogent may be the premises of fact as a matter of original consideration, they are not open to be considered by the Court because they are foreclosed by the opinion of the Commission.

Interstate Commerce Commission vs. Del., L. & W. R. R. Co. 220 U. S., 235, 251, 252.

As was aptly stated in State vs. Houser, 122 Wis. 570:

> "If the Commission exercises its honest discretion however wrong its decision from the standpoint of truth in the abstract, in the eye of the law it is the indisputable right of the matter, subject only to jurisdictional defects."

III.

The Court confines its consideration of questions of fact before the Commission to those upon which the jurisdiction of the Commission is dependent.

The Commerce Court in its opinion cited the case of Oregon R. R. & N. Co. vs. Fairchild, 224 U. S., 510, as sustaining the right of the Court to review the facts upon which the order of the Commission was based In that case the order was not merely administrative, but constituted the taking of property; the existence of a public necessity was the jurisdictional fact; and the law of the State of Washington expressly granted the right of judicial review of the evidence in such cases. The distinguishing features of that case are so obvious as to dispense with further comparison.

In those cases in which this Court has set aside an order of the Commission since the adoption of the Hepburn amendment, it will be found that the Commission either did not (a) find and declare that the existing rate or practice was unreasonable or discriminatory, but predicated its opinion upon an erroneous principle of law without deciding the issue of fact; or (b) the Commission erroneously construed the facts upon which its jurisdiction rested.

> Southern Railway Co. vs. St. Louis Hay Co., 214 U. S., 297;
> Interstate Commerce Commission vs. Delaware, L. & W. R. Co., 216 U. S., 531;
> Southern Pacific Ry. Co. vs. Interstate Commerce Commission, 219 U. S. 433;
> Interstate Commerce Commission vs. Northern Pacific Railway Co., 216 U. S. 538.

The proposition is this: Was the question of fact one upon the decision of which the jurisdiction of the Commission depended; or was it one committed by law to the decision of the Commission? In the one case the Court may determine for itself whether the jurisdictional fact existed; in the other the opinion and decision of the Commission forecloses judicial inqury. Whether a practice or privilege is unjustly discriminatory is a question of fact falling within the latter category.

A simple example will serve to illustrate the proposition. If the Interstate Commerce Commission should fix a rate for or make a regulation affecting intrastate commerce, such an order would, of course, exceed its authority; nor would the decision of the Commission that the traffic affected is interstate commerce confer jurisdiction, if in fact it was not interstate commerce; and this jurisdictional fact the Court may inquire into. So the Secretary of War is given power to remove unreasonable obstructions to navigation. Should he direct the removal of a bridge from a stream that is clearly not navigable the Courts would set the order aside. Whether or not the stream is navigable is a jurisdictional fact; whether the obstruction is unreasonable is a matter to be determined by the Secretary of War in the exercise of his discretion.

CONCLUSION.

Governmental regulation has proven wholesome and beneficial alike to the carriers and the public. No intelligent shipper desires to deprive the carriers of their just reward, or impair their ability to serve the public. The history of the Interstate Commerce Commission shows that it has on the whole wisely and conservatively exercised the comprehensive powers confided to it. The Courts therefore should not set aside the orders of the Commission except upon the gravest consideration and in cases of clear excess of power. The Court will not construe errors of judgment, if they be found, as manifesting an excess of power, even though seeming injustice may sometimes result.

As was observed by the present Chief Justice in the case of Ocean Navigation Company vs. Stranahan, 214 U. S., 320, it would be a mistake to assume that the Courts alone may be safely entrusted with power, and that it is their duty to exercise prerogatives which they have no right to exert "upon the assumption that wrong must be done to prevent wrong being accomplished."

We therefore respectfully submit that the judgment of the Commerce Court should be reversed and the order of the Interstate Commerce Commission sustained.

January 1, 1913.

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Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. [redacted] 39

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
W. S. DUNCAN & COMPANY, ET AL., Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
NASHVILLE GRAIN EXCHANGE, and
NASHVILLE BOARD OF TRADE, Appellees.

BRIEF FOR THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

MERREL P. CALLAWAY,
R. WALTON MOORE,
Solicitors for Nashville, Chattanooga
& St. Louis Railway.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 706.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
W. S. DUNCAN & COMPANY, ET AL., Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
NASHVILLE GRAIN EXCHANGE, and
NASHVILLE BOARD OF TRADE, Appellees.

BRIEF FOR THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

STATEMENT OF THE CASE.

The Single Question To Be Decided Relates to the Validity of an Order of the Interstate Commerce Commission Condemning as Unduly Discriminatory, in Violation of the Third Section of The Act to Regulate Commerce, a Reshipping Practice in Effect at Nashville, Tennessee, Which Order Was Set Aside by the Commerce Court.

The appeal is from a final decree of the Commerce Court rendered June 15, 1912, wholly annulling an order made by the Interstate Commerce Commission.

In the proceeding before the Commission, entitled W. S. Duncan & Company, *et al.*, vs. Nashville, Chattanooga & St. Louis Railway, *et al.*, which was instituted by dealers engaged at certain Georgia cities in the business of buying and selling grain, grain products and hay, there was put in issue the right of the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad Company to maintain at Nashville, Tenn., a reshipping practice which was claimed to be inherently unlawful, in the sense of being "an illegal device by means of which grain, grain products and hay may be transported at less than the tariff rate applicable thereto" (this being the original finding of the Commission, which it afterwards revoked), or at least unduly discriminatory—a practice which, as not denied, has been continuously in effect for more than forty years, on the faith of which large investments have been made, and which cannot be abandoned without serious disturbance of the existing situation, and heavy loss to the Nashville public and carriers.

The first order of the Commission, which accompanied its original report, condemned the practice as inherently unlawful. But by its second order, which accompanied its supplemental report, the Commission having reached the conclusion that the practice is inherently lawful, condemned it as unduly discriminatory and directed that it either be abandoned at Nashville or extended to ten Georgia cities, namely, Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome and Athens, the Commission being of opinion that the practice gives an undue preference to Nashville over the Georgia cities enumerated.

The two Nashville carriers instituted the present suit in the Commerce Court against the United States for the purpose of having the order enjoined and set aside, because, as alleged in their original petition, and the amendment thereto, it is unwarranted by the evidence, and constitutes an unauthorized invasion of their rights. At the same time there was another similar suit brought by the Nashville Grain Exchange and the Nashville Board of Trade, representing the Nashville public, which desires the maintenance of the practice in question.

The Commission and also those who were parties complainant in the Commission proceeding, and who will hereafter be referred to as Duncan & Company, were allowed to intervene and become defendants in the suit of the carriers; the two suits were consolidated and the petition in the second suit ordered to stand as an intervention petition in the first suit. There were motions to dismiss denying the jurisdiction of the Commerce Court to review the Commission's order, and answers denying that the order was without evidence to sustain it; a preliminary injunction was awarded; the record of the Commission proceeding was introduced in evidence and additional evidence was introduced, which is substantially a repetition of that considered by the Commission.

Unless otherwise indicated, the evidence to which reference is hereinafter made is the evidence which was introduced in the Commission proceeding, and the only evidence which the Commission could have considered in reaching its conclusion and making its order. Much of the evidence before the Commission—nearly all between pages 521 and 694 of the present record—relates to other matters than that to which this litigation relates.

The single question decided by the Commerce Court, and the single question to be decided by this Court in determining whether or not the Commerce Court erred in its decree, concerns the validity of the order of the Commission condemning, as unduly discriminatory against the Georgia cities, the reshipping practice in effect at Nashville, which, but for the supposed undue discrimination, would be permitted now and throughout the future, because found to be inherently lawful.

In advance of summarizing the evidence bearing upon the issue of undue discrimination, it is desired to state in a few words what the practice is, why it is complained of, and by whom.

As shown by the maps in the record, the Nashville, Chattanooga & St. Louis Railway and the

Louisville & Nashville Railroad Company now operate from various Mississippi and Ohio River crossings through Nashville to various southeastern points beyond Nashville, located on their own rails (the only such points mentioned in the Commission's order are Atlanta and Rome), and in connection with other carriers, to various other southeastern points not located on their own rails.

The reshipping practice at Nashville, which is provided for by the individual tariffs of the two Nashville carriers, and which is not specifically set forth in any other tariffs to which their connections are parties, is as follows: On grain, grain products and hay shipped to Nashville by rail from or through Ohio and Mississippi River crossings, the full local rates from the crossings to Nashville are paid. The shipments may be stopped at Nashville for a period of not exceeding six months, during which they may be reshipped to the territory of final destination, *e. g.*, to the Georgia cities enumerated in the Commission's order. On such shipments as are thus forwarded beyond Nashville, the local rates from Nashville to destination are not assessed, but the charges into and out of Nashville are adjusted so that the total transportation charge on any shipment from any given Ohio or Mississippi River crossing via Nashville to any given final destination shall exactly be or correspond with the joint rate assessable on that shipment had it been billed and moved through from its point of origin at the crossings to its final destination without having been stopped in transit at Nashville. For example, the local rate on grain from Evansville, on the Ohio River, to Nashville, is 10 cents per 100 pounds, and the local rate from Nashville to Atlanta is 17 cents per 100 pounds. The joint rate from Evansville to Atlanta is 24 cents per 100 pounds, or 3 cents less than the sum of the locals. Under the reshipping practice the joint rate of 24 cents is protected when the shipment has been stopped in transit at Nashville. The local rate of 10 cents from Evansville to Nashville having been paid at the time of the shipment into Nashville, an adjustment of the total transportation charge is made when the reshipment to Atlanta occurs, so that the shipper in the end pays upon the shipment the joint rate instead of the combination of local rates into and out of Nashville. The joint rates on grain, grain products and hay from the river crossings to the territory of destination, as for instance, the joint rates from the river crossings to the Georgia cities, are shown in a tariff to which all of the carriers operating in the Southeast, including the Nashville carriers, are parties, which does not refer specifically to the reshipping practice at Nashville, but in a general way provides that such privileges as are shown in individual tariffs shall be incident to the application of joint rates, and in this general way the reshipping practice at Nashville is sanctioned.

This practice for which the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad Company are primarily and individually responsible, would not be complained of by their connections, even if it could be and were maintained without the concurrence of the latter, since it insures the protection of the same joint rates which apply when the commodities move without stoppage in transit at Nashville.

The practice cannot be complained of by other carriers than the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Railroad Company, operating southward from any of the crossings, since from any crossing to any final destination the joint rates are the same, whether the movement is via Nashville or via some other route.

The practice cannot be complained of by consumers in the territory of ultimate destination, since the commodities purchased by them bear the same transportation charges, whether moving via or stopping in transit at Nashville or not.

The practice is only complained of by wholesale dealers, by jobbers who are engaged at the Georgia cities in the business of buying and reselling grain, grain products and hay. The ground of their complaint is that the Nashville dealers are enabled to have their purchases shipped from the river crossings to Nashville and thence reshipped on total rates which, to many destinations (namely, the so-called common or basing points of which Atlanta and Griffin are examples), though not all (to so-called local points the rates from Nashville are made by combination on the common or basing points), are less than the total of the rates from the crossings to the Georgia cities, combined with the rates from those cities to the same destinations. For example, a carload of grain shipped from Evansville to Nashville and thence reshipped to Griffin, Georgia, a common or basing point at the junction of the Southern Railway and Central of Georgia Railway, about forty miles south of Atlanta, pays 29 cents per 100 pounds, which is the amount of the joint rate from Evansville to Griffin. In other words, the Nashville dealer, buying a carload of grain at Evansville, which is stopped in transit at Nashville, and thence reshipped to Griffin, does not pay the sum of the local rates of 10 cents from Evansville to Nashville and 22 cents from Nashville to Griffin, but pays a total of 29 cents, whereas the Atlanta dealer, buying a carload of grain at Evansville and shipping it to Atlanta pays 24 cents for that service, and when he reships it from Atlanta to Griffin, pays the local outbound rate to Griffin of 8 cents, making a total of 32 cents, or 3 cents more than is paid by the Nashville dealer. It goes without saying, however, that the Atlanta dealer can have the shipment billed through from Evansville to Griffin on the joint rate of 29 cents.

The naked issue passed on by the Commission is the claim of the Atlanta jobbers and jobbers similarly situated in the territory of destination, who united in the complaint to the Commission, that the reshipping practice at Nashville affords an undue advantage to Nashville dealers, and that either it should be withdrawn, with the result of placing the Nashville dealers and the Atlanta dealers on the same footing with reference to such destination markets as Griffin, or else that the practice should be extended to and established at Atlanta, so as to produce the same result.

It should be noted that the proceeding before the Commission did not involve any attack upon the reasonableness of any rates. There was no such issue presented to the Commission or touched by its order, and, therefore, and because no one at Nashville complains, and the entire Nashville public, so far as the record shows, approves the existing situation and desires its continuance, any suggestion that may have been made by the Commission, and any argument that may have been or may be made by the appellants as to the possibility of the reshipping practice having the effect of maintaining local rates from the crossings to Nashville above what they would be without the employment by the carriers of that method of meeting the boat competition on the Cumberland River, is obviously irrelevant.

There should also be noted as irrelevant, the suggestion, not made to or by the Commission, and apparently never made except by Counsel for the Commission in the Commerce Court and here, that the practice is in violation of the provisions of Section 2 of the Act to Regulate Commerce. Even if Section 2 were not, as it is, foreign to the case, it is clear that the order of the Commission rests upon Section 3 of the Act. The concluding paragraph of the supplemental report by which it was accompanied expresses the Commission's finding and opinion, as follows:

> "After a careful consideration of all the pertinent facts and circumstances, we are of the opinion and find that the matters and things complained of herein constitute the undue and unreasonable preference and advantage and the undue and unreasonable prejudice and disadvantage, as between the parties to this proceeding, prohibited by Section 3 of the Act to Regulate Commerce, and an order will be issued accordingly."

A Summary of the Evidence before the Commission and Considered by the Commerce Court, Bearing upon the Origin and Maintenance of the Reshipping Practice at Nashville, and the Issue of Undue Discrimination, and the Undisputed facts Thereby Established.

It is proposed, without unnecessary detail, in reviewing the evidence, to state what are the controlling facts thereby established. Attention will be called to any conflict of evidence or any dispute as to any fact, and otherwise it may be assumed that there is believed to be no such conflict or dispute.

As there may be occasion to refer to the evidence introduced before the Commerce Court, in addition to the Commission record, it should be borne in mind that such evidence is not at variance with, but in every material respect a duplication of, that which was introduced and considered in the Commission proceeding.

1. The fundamental fact is Nashville's location on the Cumberland River, which is and always has been navigable by boats engaged in the business of handling grain, grain products and hay and other commodities.

The Cumberland River will never become less navigable, for the work which has been and is being done by the Government of the United States is rendering the river constantly more available for transportation purposes. Testifying in 1908, Mr. E. B. Stahlman, a leading citizen of Nashville, commenting upon the Government work then in progress on the Cumberland River, said "ten years hence it will be navigable the year around." (Tr., p. 713.)

The Cumberland River is, so to speak, an arm of the greater waterways of the West and Northwest which traverse the region upon which the Southeast has always been largely dependent for its supply of grain, and Nashville, located on that river, much nearer the region of production than any of the Georgia cities, none of which are similarly located, is and always has been quickly and easily reached by boats loaded with grain and hay produced in the valleys of the Wabash, the Mississippi and Ohio Rivers, and in the valley of the Cumberland River itself.

It is the physical location of Nashville and the inevitable results thereof that led the witnesses who testified as to the conditions there being utterly dissimilar to the conditions at any of the Georgia cities, to the unanimous conclusion, as one of them expressed it, that "nature gave Nashville the reshipping practice." (Tr., p. 650.)

Not only is there this dissimilarity, but at the time long ago when the reshipping practice was instituted, it could not have been designed as a preference to Nashville over the Georgia cities mentioned in the Commission's order, because many of those cities were not then in existence, and even Atlanta, which is the principal one of those cities, had then attained little importance.

2. Nashville, before the construction of any railroad to that point, received by river the grain which it locally consumed, and any grain which it was able to distribute southward by primitive means of transportation.

The first railroad which furnished an efficient means for the distribution of grain in the Southeast was the road completed between Nashville and Chattanooga in 1854. The cities of Charleston and Savannah contributed largely to the completion of that road and its connections with Atlanta and the seaboard, for the purpose, declared at the time, of connecting the cotton-producing section of the country with the grain fields of the West (Tr., p. 703). That road is a part of the Nashville, Chattanooga & St. Louis Railway system.

It will be seen by reference to the map at page 801 of the transcript that when Nashville was thus linked up with the southeastern territory, none of the Ohio and Mississippi River crossings were connected by rail with that territory, nor were any of those crossings connected by rail with Nashville.

Accordingly, in 1854 Nashville was the one market for the concentration of the grain supply of the Southeast. There is a difference of opinion as to whether Nashville is a "primary" grain market, which imports nothing more than a difference of opinion as to the meaning of that term. There is, however, no controversy as to its having been the first market for the concentration of grain destined to the Southeast, the first gateway through which the Southeast received its supply of grain (Tr., p. 769).

It is clear that, had railroad construction altogether ceased in 1854, all grain and hay originating in the producing territory that has been described, and consumed in the Southeast, would still be concentrated at Nashville, moving to that point under rates charged by the water carriers, and moving out to the Southeast under the local rates of the rail carriers.

The maps at pages 803, 4 and 5 of the transcript show in a general way the evolution of railroad construction in the period subsequent to 1854.

The first line built from any of the crossings of the Ohio and Mississippi Rivers to Nashville was that of the Louisville & Nashville, which was completed from Louisville in 1859. As grain was then moving to Nashville by water, and under rates lower than were deemed normal rates for rail transportation, the company operating the new line, finding itself compelled to reckon with the river competition, for that purpose, established rates on the commodities in question from Louisville to Nashville lower than rates to intermediate points on its line, not located on the Cumberland River. This action, which was not voluntary, but forced upon the Louisville & Nashville by the necessity of competing, represented the very first departure in the history of that company from the principle now expressed in the fourth section of the Act to Regulate Commerce. This adjustment had the effect of reducing below the level which would have obtained except for the location of Nashville on the Cumberland River and the movement of grain to Nashville by water, not only the local rail rates from Louisville to Nashville, but the through rates to southeastern destinations made up of the sum of those locals and the local outbound rates from Nashville.

It is clear that the action of the Louisville & Nashville could not have been dictated by a purpose to give Nashville any advantage over localities in the Southeast or elsewhere, but was constrained by natural conditions, resulting in transportation conditions peculiar to Nashville, as compared with other places. It was a water competitive adjustment.

3. During the period following the completion of the road between Chattanooga and Nashville in 1854, while the company operating that road had no line between Nashville and any of the river crossings, it could have no interest in the method of or the rates applicable to the concentration of grain at Nashville, its interest being confined to transportation southward from Nashville. It could have no concern about rates from the crossings to Nashville, or from the crossings to the final destinations. Its only concern was with the rates from Nashville to those destinations.

During the period following the completion of the road from Louisville to Nashville in 1859, in which the Louisville & Nashville had no line south of Nashville, that company, while interested in the transportation of grain to Nashville, and, as has been seen, forced to meet the water competition, was not interested in or concerned about the total transportation charges from the crossings through Nashville to the Southeast. It was not yet any more interested in the through rates than was the Nashville, Chattanooga & St. Louis.

During the Civil War a road which had been projected from Nashville across the Tennessee River, at

Johnsonville, Tenn., to Hickman, one of the Mississippi River crossings, was completed by the United States Government for strategic purposes. Prior to 1870 a controlling interest in that road was acquired by the Nashville, Chattanooga & St. Louis Railway, and the road was purchased in 1872 (Tr., p. 781). The exact date of the reshipping practice being instituted by the Nashville, Chattanooga & St. Louis Railway seems a little uncertain, but this point is not material, as there is no dispute that the date is not earlier than 1869, and not later than 1872. The correct date is probably 1870, as testified by Mr. Stahlman (Tr., p. 706), and Mr. Compton, Freight Traffic Manager of the Louisville & Nashville Railroad Company (Tr., p. 588). As the Nashville, Chattanooga & St. Louis Railway was not interested in through transportation from any of the river crossings to the Southeast until it acquired the ownership, or at least the control, of the Hickman line, it previously had no motive for instituting the reshipping practice.

It was subsequent to the control of the Hickman line being acquired by the Nashville, Chattanooga & St. Louis Railway, that the Louisville & Nashville became interested in the through transportation by acquiring a line from Nashville to Decatur, Alabama, which it afterwards extended to Montgomery, Ala., and it was subsequent to the inauguration of the reshipping practice at Nashville by the Nashville, Chattanooga & St. Louis Railway, that it was adopted by the Louisville & Nashville.

4. Having become interested in transportation from the Mississippi River through Nashville to the Southeast, the Nashville, Chattanooga & St. Louis Railway was immediately confronted by the necessity of meeting the river competition. It was possible to do this by reducing, and from time to time varying the reduction of, its local rates into Nashville, to enable it to share the traffic with the boats, such rates to apply to the entire traffic, whether originating in the valley of the Cumberland River, or in the grain fields traversed by the other rivers, and whether to be consumed at Nashville, or distributed for consumption in the Southeast. That expedient would have represented the extreme measure of active and effective competition with the water carriers, which was within the power and right of the railroad company. The reshipping practice was adopted as an alternative expedient, having direct relation only to the traffic moving from the river crossings to Nashville and thence reshipped, and having no direct relation to grain originating elsewhere, and grain consumed at Nashville.

To illustrate, the railroad company might have dealt with the situation by establishing and maintaining a local rate of 7 cents per 100 pounds (this is, of course a violent assumption that no further reduction would have been necessary) on all of the grain moving to Nashville, whether for local consumption or transshipment, which, combined with a local rate of 17 cents to Atlanta, or a local rate of 22 cents to Griffin, would have made totals of 24 cents and 29 cents to those destinations respectively, or exactly the equivalent of the joint rates now in effect, as a substitute for the reshipping practice which produces precisely the same totals, but this would, of course, have not only involved a shrinkage of rates and revenue on the through movement, for the purpose of meeting the water competition, but a shrinkage of rates and revenue on all of the local business, for the purpose of meeting that competition, albeit the rail carrier was unwilling to directly and completely meet the competition on the local traffic.

As the location of Nashville, with transportation by water as the dominant incident, is the master fact which accounts for, explains and justifies, the reshipping practice, very full and explicit evidence was offered to show the activity with which river transportation to Nashville was conducted at the time of the reshipping practice being inaugurated. Among the witnesses whose testimony is not contradicted are Messrs. E. B. Stahlman, already mentioned (Tr., p. 699), T. M. Gallagher (Tr., pp. 665-771), G. W. Ashcraft (Tr., pp. 846-849), and A. S. Hard (Tr., p. 850).

Mr. Stahlman, speaking of the period from 1865 to 1872, describes transportation by water to Nashville as then being very active. To verify his recollection, he filed advertisements published in the contemporary press naming the boat lines and individual vessels operating between Nashville on the

Cumberland River, on the one hand, and all the Ohio and Mississippi River crossings, on the other hand, and carrying the traffic not only from the rivers mentioned, but from rivers tributary thereto, as for instance, the Red River and Arkansas River. He also filed photographs depicting scenes on the waterfront at Nashville, showing how several vessels would be busy loading and unloading there at the same time. His testimony refers to the period when the Nashville, Chattanooga & St. Louis Railway, considering how it should meet the water competition, determined to adopt the reshipping practice (Tr., p. 698).

Mr. T. M. Gallagher is a steamboat captain, whose experience has made him very familiar with the conditions at Nashville which are now being discussed, as appears from the following extract from his testimony:

> "I have spent my entire life on the Cumberland River. I know something about the traffic proposition there, I expect probably better than any man living today. The old ones are all dead and gone. Before the War—as it was handed down to me by my father, who was a steamboat man on the Cumberland River—the Cumberland River was one of the most important highways for commerce west of the Alleghany Mountains, not excepting the Mississippi from St. Louis down. He owned and controlled some of the largest steamboats that navigated the river in that day and time. As we all know, the Ohio Valley, the Mississippi Valley, and the Cumber-

land River Valley depended entirely upon steamboat transportation. So with Nashville at that time, as it was handed down to me by my father, who steamboated here before the War. In 1854, as I understand, the Chattanooga Railroad was completed. After I attained the age of 13 years of age I realized the fact that the Chattanooga road and the Cumberland River were a great proposition for the reshipment of grain to the South and Southeast. I was a little bit young then. I was down there weighing corn at 13 years of age, on the wharf, and our service was not as good then as it is now, of course. From that fact, Nashville being located on the Cumberland River and in connection with the Nashville & Chattanooga Railroad leading to the Southeast, has been an important gateway for the corn purchased in the Wabash and Mississippi River valleys in the early period of Nashville's history. I will just state here that Mr. I. T. Ray is not here with us, but his father, Major Ray, was here then. There was then no grain marketed at either St. Louis or these other cities in the line of connection and communication to the Southeast. The Cincinnati Southern Railroad and its connections had not been built. The Louisville & Nashville Railroad operated only from Louisville to Nashville. It had not extended its line to St. Louis. There were no bridges across the Ohio River and the gauges of the railroads north and south of the Ohio River were different and these conditions presented obstacles to Louisville becoming a primary grain market." (Tr., p. 775.)

Mr. Ashcraft, in 1863 and 1864, was master of a steamboat running between Louisville and Nashville, and carrying corn, hay and grain. The grain was obtained on the Ohio River. At the same time there were hundreds of other boats handling grain from points on the Ohio and Wabash Rivers to Nashville. He says:

> "To give you an idea of the number of steamers bringing freight to Nashville off the Ohio River, the closest landing that I could at times make was at the old race track, which was two miles from the upper wharf. There were two wharves at Nashville, the upper and lower wharf. I have seen at a given time as many as four or five steamboats lying abreast at the wharf unloading, and other boats four or five deep, awaiting their turn to be unloaded at the wharf. I have seen this condition at both of the wharves at Nashville." (Tr., p. 847.)

Mr. Ashcraft was in position from 1871 to 1875 to know of many transient boats, including towboats, handling Ohio and Wabash River grain to Nashville, in addition to the regular boats exclusively engaged in that business.

Mr. Hard, from 1865 to 1874, was a clerk on the boats of the Nashville & Cairo Packet Company, plying between Nashville and Cairo, that company operating three boats with a capacity of between 400 and 500 tons. On occasions these boats went 30 or 40 miles up the Mississippi above Cairo for grain to be carried to Nashville. He says:

> "During all the time that I was employed on the river between Cairo and Nashville, I continually witnessed the carriage of grain in large quantities by other boats which plied between Wabash and Ohio River landings and Nashville." (Tr., p. 851.)

5. Correctly stating what it designates as "the undisputed facts which gave rise to the establishment of the reshipping practice at Nashville" and to the undisputed facts which warrant its maintenance, the Commerce Court in its opinion says:

> *"After the Nashville & Chattanooga Railroad became the owner of the line of road from Hickman to Nashville it constructed and put in operation free elevators on the Tennessee River at Johnsonville and on the Mississippi River at Hickman, and by so doing sought to attract shipments of grain moving from the Mississippi and Ohio Rivers to its 171-mile haul to Nashville, and then to carry it to the Southeast. It was found, however, that notwithstanding the establishment of the free elevators at the points indicated, most of the grain from the Wabash, Mississippi, Ohio and Cumberland River valleys continued to come into Nashville by boat on the Cumberland River. The boat and rail rate from the Wabash, Ohio, and Mississippi River grain-producing valleys, via Hickman and Johnsonville, to Nashville, was higher than the all-river rate accepted by the boats upon grain from these grain sections up to Nashville. The N. C. & St. L. Railroad was therefore obliged to take some steps to meet this situation in order to protect its railroad running from Nashville west, and to procure the longest possible haul from the grain-producing sections aforesaid to the grain-consuming territory in the Southeast.*

"The N. C. & St. L. Railroad could have done this in either one of two ways. It could have fixed and accepted a very low local rate from the river crossings up to Nashville, thus meeting the steamboat competition; or it could have established a through rate from the river crossings to the Southeast via Nashville, protecting this through rate by extending the privilege of reshipping at Nashville. It chose to follow the latter course in order better to subserve and protect its revenues. A very low local rate up to Nashville would have unnecessarily sacrificed revenue. This low rate would have been applicable to all the grain locally consumed at Nashville or points based on Nashville, and if the road had unduly reduced the local rate up to Nashville to meet the steamboat competition it would have been impossible to maintain the existing scale of rates on other commodities besides grain which were going to Nashville in large quantities for local consumption. This was the origin of the reshipping privilege which has existed for forty years at Nashville. It was caused by competition in the shipment of grain from the Mississippi and Ohio Rivers by boat to Nashville on the Cumberland River.

"The Cumberland River still exists, and Nashville is still located upon it. For all practical purposes, the situation, so far as competition on the Cumberland River is concerned, is the same potentially as it was in 1872. We must not deceive ourselves by believing that the L. & N. and the N. C. & St. L. extended this reshipping privilege to shippers and dealers at Nashville as a favor to the shippers and dealers or as a favor to Nashville. The simple truth is that the railroads extended the privilege to these shippers and dealers so as to obtain the shipment of grain from Mississippi and Ohio River crossings over their own lines."

In the briefs of counsel for Duncan & Company and the Commission there is a very cautious criticism of the explanation of the origin of the reshipping practice as unanimously given by the witnesses, and which is the explanation unhesitatingly accepted by the Commerce Court, and apparently, also accepted by the Commission when it first considered the matter. In the brief of counsel for Duncan & Company it is said: "The evidence is not undisputed that the privilege was originally accorded Nashville solely because of the competition of the Cumberland River. While there is some testimony in the record to this effect, *and it is nowhere categorically denied*, there are other facts and circumstances indicating that the real object of the rail lines was to equalize Nashville with the Ohio and Mississippi River crossings and thereby secure a larger participation in the movement of the grain traffic from the Northwest into the Southeast; and the record makes it plain that this object was attained." In the brief of Counsel for the Commission it is said: "The purpose of putting in the rebilling privilege was not to meet the water competition into Nashville so much as it was to secure the through traffic—to aid the railroads in overcoming the competition at the river crossings. A reference to the testimony makes this very apparent." What counsel are supposed to mean is that the Nashville, Chattanooga & St. Louis Railway, and a little later the Louisville & Nashville Railroad, established the reshipping practice for the purpose of enabling them "to compete with other lines of railroad from the Ohio and Mississippi Rivers into the

Southeastern territory," the words last quoted being part of a question to one of the witnesses by counsel for the Commission, as see page 22 of his brief.

But all of the evidence is against the suggestion of counsel, and a mere glance at the maps in the record shows that it is entirely fanciful. When the Nashville, Chattanooga & St. Louis Railway instituted the reshipping practice there was no railroad from any of the Ohio River crossings to the Southeast with which that company could find it necessary to compete. The only road from any of the Ohio River crossings southward was that of the Louisville & Nashville, completed in 1859, as has been stated, and that line did not extend beyond Nashville. The 1870 map shows a line from Evansville to Nashville, which, however, was not finished until 1875, and which, owing to a lack of facilities, could and did handle very little grain traffic after its completion. It may be noted in passing that the Evansville road was acquired by the Louisville & Nashville in 1879 or 1880. (Tr., p. 707.) In 1870 there was a railroad from Memphis to Chattanooga, but not extending further into the Southeast, and there is not a scintilla of evidence that any of the commodities in question were moving by that route, even to Chattanooga, at the time of the institution of the reshipping practice by the Nashville, Chattanooga & St. Louis.

As the explanation of the action of the carriers, of course, lies at the very heart of the case, it is well to quote from the testimony of every witness mentioned by counsel as giving color to their argumentative surmise, in order to put the explanation beyond any possible doubt. The witnesses are Messrs. Compton, Stahlman, H. F. Smith, Vice-President of the Nashville, Chattanooga & St. Louis Railway, and Charles Barham, General Freight Agent of that company. Mr. Compton says:

> "The reshipping at Nashville was inaugurated many years ago, as I explained before. The Louisville & Nashville and N. C. & St. L. railroads were compelled to protect their revenues and the revenues of connecting lines against the competition of the Cumberland River. Nashville is a natural primary grain market located on the Cumberland River and its location on that river gives it access and efficient means of transportation to and from the entire western country, making Nashville, so far as the Southeastern territory is concerned, not an interior Southern point, but a Western distributing point. The Louisville & Nashville Railroad Company, operating from St. Louis, Evansville and Louisville to Nashville, and the N. C. & St. L. Railway, operating with its connections from Cairo, Hickman, etc., to Nashville, were in competition, and are in competition, with the boats in the Cumberland River, and the movement of grain, etc., from the West to Nashville. It was necessary in order for those roads to control the business destined to Nashville and to points in Southeastern territory through Nashville to either establish very low rates from the Ohio River crossings to Nashville proper or to establish reshipping arrangements at Nashville under which the

through rates from the Ohio and Mississippi River crossings to points in Southeastern territory would be protected on traffic shipped and reshipped thence. By this latter arrangement it was practicable to secure the movement of traffic destined to points beyond Nashville in Southeastern territory in competition with the best boat lines for the reason that the reshipping arrangements did not apply on traffic handled into Nashville by the boats. It was also found in practice that by this arrangement it was practicable to control a fair portion of the traffic destined to Nashville proper without too radically reducing the rate from the Ohio River crossings to Nashville, which rate is at present, and has been for many years, ten cents per hundred pounds. Therefore, the reshipping arrangement at Nashville, Tennessee, was established for the double purpose of securing the movement of traffic destined to the Southeast in competition with the boats in the Cumberland River, and of protecting the revenues of the rail lines on traffic destined to Nashville proper. Of course, considerable grain traffic does and always has moved from the various Ohio and Mississippi River crossings and landings to Nashville via boat, but the reshipping arrangement has operated to give to the rail lines a reasonable portion of the traffic."

(Tr., pp. 592-3.)

And again:

"The reshipping arrangement has been continued at Nashville for the purpose of meeting the competition in the Cumberland River. It has been continued because it was the most eco-

> nomical means of meeting that competition and in the protection of the revenues of the Louisville & Nashville Railroad. * * * I do not know of any arrangement that could be inaugurated which would have the effect of the protection of the railroads better than the one at present in effect. I say that from my own experience it has furnished the means or the best means of protecting the railroad company's interest in the meeting of that competition. I do not believe there is any other means that could be devised which would do so well as that."
> (Tr., pp. 416-17, Commerce Court.)

Mr. H. F. Smith, at the Commission hearing, said: "I concur in Mr. Compton's direct testimony" (Tr., p. 626). The quotation from him at page 17 of the brief of counsel is essentially irrelevant as it has reference to the payment of an *elevation allowance* at Nashville, which was one of several matters, besides the reshipping practice, which were being considered by the Commission, as sufficiently appears from its original report. There is nothing in Mr. Smith's testimony warranting the deduction that he entertained or expressed any opinion inconsistent with the testimony of Mr. Compton before the Commission.

Mr. Barham testified in the Commission proceeding as follows:

> "When we acquired the interest in the Nashville & Northwestern Road, we were confronted with the problem of controlling competition with the boats for a reasonable part of the grain and other western produce which had origin in the

western territory. That could be accomplished in either of two ways. We could reduce the rates into Nashville from the river to the level of the then boat rates, or we could devise some plan by which we could protect a through rate, all-rail, from the Ohio River to the consuming territory, which would not exceed the combination of water rates plus the rail rates. Naturally we could not charge more than that combination with any hope of controlling any reasonable part of the business. We did not want to make the Nashville proper rate the then existing boat rate, because it would sacrifice a certain revenue on whatever part of the Nashville local business we might haul in, and it would also affect all that territory basing on Nashville.

"We did not expect to eliminate the boat competition entirely. We did not expect to get all of the business which went into Nashville. We expected the boats would control some, but it was the thought that if we could, practically speaking, control the larger traffic, we could share the local business on the somewhat higher rate with the boats; that we could do a reasonable part of that business.

"We therefore devised and have continued the so-called Nashville reshipping. It was as we saw it then, and as we see it now, really not a change. The grain was moving, and moving at that rate, and it merely continued to move at that rate.

"Also, as we see it, it was in no sense a matter of choice. It was not up to us whether we wanted to do this thing or not; we had to do it; we were compelled to do it, unless we were prepared to see the Nashville & Chattanooga Road

> merely a line south of Nashville and see our division west of Nashville, substantially speaking, bankrupt." (Tr., pp. 781-2.)

Mr. Stahlman, testifying in the Commission proceeding, was asked:

> "Q. Was it in order to protect their revenues that they thought it to be correct financial policy and economy to adopt reshipping as the means of meeting the boats on the through business, which was the bulk of the business, and at the same time leave untouched and maintain their different local rates north and west of Nashville?
>
> "A. Yes, sir, the business was large. I verily believe that it would have cost the railroads two or three hundred thousand dollars a year at that time if they had undertaken to meet the steamboat competition by lowering that local rail rate on grain into Nashville.
>
> "Q. And by the reshipping practice, as I understand, the rail lines protected their revenues against the boats on the through business, which was the great bulk of the business, and distributed the burden of fighting the river competition over their entire lines north and south of Nashville?
>
> "A. That is right. It was never done to help Nashville. Nashville was in a position geographically to help herself. It was done to enable the railroads west of Nashville to share in the traffic that originated west of Nashville, in bringing it to Nashville, in competition with the boats.
>
> "Q. Did it, as a matter of fact, create anything at Nashville?

* * * * * * * * * *

"Was it but a means that the railroads adopted to deflect the traffic from boat to rail that was already moving through Nashville?

"A. It did nothing for Nashville, except what Nature had compelled them to do for Nashville; that was all. She had the river and the boats, and what they did was not for Nashville, but because Nashville had these things, and they did it for themselves, and I think, if I may be permitted to make use of the expression, that they did wisely. They had lines west and north of Nashville, and they ought to take care of the interest of those lines, and they pursued the only course left open to them to protect those interests." (Tr., pp. 181-2, Commerce Court.)

It is not understood that the Commission, in its original report, threw doubt upon the carriers' explanation of the reshipping practice. In that report it was said:

"It is claimed by defendants that reshipping at Nashville was inaugurated many years ago for the purpose of protecting the revenues of the Louisville & Nashville Railroad, the Nashville & Northwestern, and the Nashville, Chattanooga & St. Louis Railway, against the competition of boats on the Cumberland River; that the location of Nashville on the Cumberland River, a navigable stream, was sufficient to establish not only a basis of rates from the Ohio and Mississippi River crossings to Nashville and southeastern territory, but also to establish the custom of reshipping at Nashville; that the original route to the Southeast consisted of boats on the Cumberland River to Nashville and the Nashville, Chattanooga & St. Louis Railway from there on. *It* *therefore became necessary, in order to protect the revenues of the rail carriers, to either establish very low rates from Ohio River crossings to Nashville proper, or to establish reshipping arrangements at Nashville to southeastern points. By taking the latter course there was accomplished the double purpose of securing the movement of traffic destined to the Southeast in competition with boats on the Cumberland River, and of protecting the revenues of the rail lines on traffic destined to Nashville proper."*

It is true that, following this, after some discussion, the Commission further said: "We are not convinced that the circumstances and conditions under which the reshipping privilege is accorded at Nashville are so dissimilar from those obtaining at the other points involved in this traffic as to justify giving it our sanction on that ground. However, there are other aspects independent of this which lead us to regard this privilege with disfavor," and then the Commission gave the ground on which it held the practice inherently illegal, a view which was rejected in its supplemental report and order. A fair statement of the Commission's attitude is that it accepted the explanation of the carriers, recognizing the dissimilarity of conditions at Nashville; was only "*not convinced*" that the dissimilarity is sufficient to justify the practice at Nashville while it is withheld from the Georgia cities, but, after all, placed its condemnation of the practice upon the ground which it thereafter discarded, namely, that it was inherently unlawful in the sense that has been indicated.

A good deal is said by counsel about the reshipping practice having the effect of equalizing Nashville with the river crossings, but the simple truth is, as has been shown, that Nashville was a grain concentration market before grain was concentrated at any of the crossings. What has occurred is not the equalization of Nashville with the crossings, but the equalization of the crossings with Nashville. It cannot be too often repeated that the reshipping practice was not accorded and is not maintained at Nashville as a favor, but as a necessity, and that the local benefits which may attach to its maintenance are the logical result of the circumstances beyond the control of the carriers, which compelled its adoption. Quoting from Mr. Compton again: "Its location gives it what it has got. It is the location on the Cumberland River and competitive conditions at Nashville which compel this arrangement. I will say to you that Nashville enjoys no special privilege." (Tr., p. 611.)

6. The same influence that compelled the establishment of the reshipping practice compels its maintenance. Nashville is still located on the Cumberland River, which is becoming more, instead of less, available for transportation purposes; the traffic can still be moved by water at low rates, and, while the water movement has diminished under the stress of rail competition, it has never ceased, and would regain its vigor upon a disappearance or weakening of the competition.

When Mr. Gallagher testified before the Commission in December, 1908, and again in September, 1910, there were regular lines of boats and also boats performing an irregular service, operating on the Cumberland River, and carrying grain and other commodities to Nashville. He stated that the river grain reaching Nashville in 1907 and 1908 amounted to over fifty thousand tons, at the same time detailing the expensive improvements which the Government is making on the Cumberland River with a view to increasing its use for transportation purposes (Tr., pp. 666-773).

The boat rate on grain from the river crossings to Nashville has ranged from 3 cents to 9 cents per 100 pounds, and if relieved of the rivalry of the rail carriers, the boats could easily handle to Nashville all of the grain now reaching that point for local consumption and transhipment at a rate not exceeding 6 cents.

In its original report the Commission itself said:

> "The record shows that less than 1,000,000 bushels of grain were transported from Ohio and Mississippi River crossings via boat to Nashville at rates ranging from 7 to 9 cents per hundred pounds during the past season, but it was asserted that if a rate of 10 cents per hundred pounds were maintained by the rail carriers from the Ohio River to Nashville [that is to say, if the rail carriers refrained from really engaging in competition with the boats] there

would spring up sufficient boat tonnage to handle the entire grain traffic from the Ohio River into Nashville, destined to southeastern territory."

7. The enforcement of the Commission's order would result in the abandonment of reshipping at Nashville.

As has been shown, the sole reason for the practice at Nashville is found in the peculiar conditions existing there—the location of Nashville on a navigable stream, affording means for the transportation by water, at small cost, of the commodities in question from the comparatively nearby grain fields.

No similar conditions exist at any of the Georgia cities named in the Commission's order, and therefore there has been and is no such reason to institute the practice at any of those cities.

It is not only a burdensome and expensive practice, because requiring to be policed in order to avoid unlawful irregularities, but should it be instituted at any of the Georgia cities, no carrier responsible therefor could deny its extension to any other locality served by that carrier anywhere in the South where it might be demanded by a local grain dealer, for such a denial would clearly be undue discrimination, because of the absence of dissimilarity of conditions.

Aside, however, from all other considerations, neither of the Nashville carriers operates beyond any of the Georgia cities enumerated, and therefore neither of them can alone establish and maintain a reshipping practice at any of those cities, *and their connections are unwilling to join them in doing so. They have served notice that this is their attitude* (Tr., p. 78). Therefore, the enforcement of the Commission's order could have but one result, namely, the elimination of reshipping at Nashville.

While, as has been stated, this would not benefit the southeastern public represented by the consumers, it is true that there is evidence tending to show that the concentration of grain at Nashville, and its reshipment to the Southeast under the present arrangement, subjects the jobbers in the Georgia cities to a degree of competition of which they would be relieved should the Nashville dealers be disabled from bringing grain into Nashville and shipping it out under total transportation charges equalling the present joint rates. On the other hand, it is shown that the Georgia jobbers are certainly prospering. In a typical month of 1908 they handled over 6,000,000 pounds of grain, as against less than 850,000 pounds handled by the Nashville dealers, and in the same month the business of the Atlanta jobbers was three times as large as that of the Nashville dealers. For these and other details, if deemed pertinent, see transcript, page 594. The point made by the Georgia jobbers is that the competition of the dealers at the river crossings, which would not be affected by anything that might happen to Nashville, is somewhat more remote and less severe than the Nashville competition, because of Nashville's proximity to the territory of destination.

But it is plain that, even though the reshipping practice should be abandoned, grain would still be concentrated at Nashville and shipped to the Southeast, and under the same total charges as at present, if the boats can and will handle it into Nashville at 7 cents or less per 100 pounds. Indeed, boat rates on that level, or rail rates on that level, made in competition with the water carriers, might serve to produce lower total transportation charges to the Southeast through Nashville than now prevail, whereupon, of course, the river crossings would be equalized with Nashville. And in no such event could any benefit accrue to the grain jobbers in Atlanta or any other of the Georgia cities. It is important, therefore, to ascertain from the evidence what may be expected to follow the abandonment of the reshipping practice at Nashville if the Commission's order is enforced, because this is perhaps one way, although not the necessary way, in which may be tested the claim that the maintenance of the practice creates undue discrimination.

During the long period of the maintenance of the practice the business of the Nashville dealers and carriers has, of course, been adjusted and conducted with reference thereto. Grain warehouses and elevators representing an investment of millions of dollars have been built adjacent to the tracks of the railroads, and away from the river. The withdrawal of the practice would produce uncertainty as to the means by which grain would thereafter move into Nashville, which would impair the value of the large investments referred to, and cast doubt upon the ability of the carriers to realize such revenue as they now earn and believe they are entitled to receive from the transportation of the Nashville traffic.

It is not denied that this would probably be the immediate effect, and that, if there is anything in the point made by the Georgia jobbers, some of them, for the time being, might profit by the enforced change and consequent temporary demoralization at Nashville, but the evidence leaves no room to suppose that the diversion of business from Nashville to the river crossings that might for a short time attend the change, would continue. On the contrary, the evidence is that Nashville would soon regain its importance as a concentration market for southeastern grain which would move under total transportation charges from the crossings to the Southeast, not exceeding the present joint rates. The grain would be brought into Nashville by boats, and by the railroads under flat local rates which they would be compelled to make for the purpose of competing with the boats, and moved out of Nashville to destination on the present local rates. This would mean the temporary disappearance of any little transient benefit that might have accrued to the Georgia jobbers from the Nashville business in the Southeast having been to any extent temporarily curtailed, and to that extent, temporarily diverted to the river crossings.

The pregnant fact is that on the movement into Nashville should the railroads establish a flat rate it could not exceed 7 cents per 100 pounds. They could not hold the traffic against the water carriers on a higher rate than 7 cents, and that rate might not prove sufficiently low for the purpose of effective competition. This is very clearly shown by the testimony relative to the general aspect of the case now being discussed.

One of the witnesses, Mr. Gallagher, a director and traffic manager of the Cumberland River Steamboat Company, being asked whether he "would undertake to transport all of the grain or a quantity of the grain that is reshipped from Nashville to the Southeast at rates not to exceed 6 cents per 100 pounds from those points into Nashville," answered: "Personally I believe I could get a company in 15 days if those rates were maintained. I know it would be done in 15 days' time if the railroads would maintain their rates" (Tr., p. 772). In other words, this witness, whose knowledge of water transportation at Nashville seems to be unequalled, gives it as his opinion that, assured the maintenance by the railroads of a flat local rate of 7 cents, he could arrange to handle the traffic by river at a rate of 6 cents, driving the railroads out of the business.

Another witness, Mr. Kelly, a Nashville miller, testified in the Commission proceeding in 1910 that in July and August of that year he brought 65,000 bushels of wheat from Mississippi

River landings to Nashville by boat, and that subsequent to the first of March of that year he brought into Nashville by boat about 100,000 bushels of grain from Ohio River landings. Asked whether in packets and barges the grain can be handled from any point on the Ohio River up to Nashville, he answered:

> "We are not steamboat people, and I do not know much about the cost. I will say, however, that I bought a good many cargoes of corn and wheat from dealers on the Ohio River who chartered a tug and sent the grain down in barges, and in conversation with them they told me they could carry it down that way for 6 cents a hundred. We had nothing to do with the transportation. We bought at a certain price delivered in Nashville." (Tr., p. 734.)

Another witness, Mr. Hughes, one of the Nashville grain dealers, was questioned by counsel as follows:

> "Q. * * * if the carriers at Nashville were to withdraw transit privileges there extended and were to maintain their present tariff rates in and out, state whether or not from your observation and knowledge of conditions at Nashville and especially with respect to the Cumberland River, could the grain be brought into Nashville by boat, and would the boats come to the river for the traffic?
>
> "A. Without a doubt, if they had any guarantee that the railroads would hold their present tariffs. It would be a fine opportunity.

"Q. At what rate, from your knowledge and experience, will ordinary towboats and barges carry grain into Nashville from these Ohio and Mississippi River crossings? * * *

"A. I should judge they ought to be able to do it very nicely for 5 or 6 cents.

"Q. That is, with ordinary equipment?

"A. Yes.

"Q. Now, suppose that there were improved equipment of the very best well-known type. Take steel barges and tugs constructed especially with respect to that business, that would not make local landings, that would minimize labor and economize in all the well-known modern ways. I will ask you to state what, in your judgment the grain that is now coming into the Nashville market could be handled at from these river crossings up to Nashville by the river? * * *

"A. 3 cents.

"Q. By Commissioner Clements: With a fair profit to the boat lines, do you think?

"A. I do not think there is any question about that."

(Tr., pp. 741-742.)

The forecast of the appellees as to what would follow the abandonment of the practice, is in line with the views expressed in the brief filed in the Commission proceeding by counsel for Duncan & Company and the other firms and individuals who were solely responsible for that proceeding, except for which there would have been no order to attack in the Commerce Court, and no appeal here, and in the brief filed in the Commerce Court by counsel for the Commission. The statements of counsel now to be quoted constitute an impressive argument that the reshipping practice does not represent a full exercise by the rail carriers of their right of competition; that, upon its abandonment, they would be compelled to compete more actively and effectively at the risk of losing the business, and that, whether they should do so or not, grain would be concentrated at Nashville and moved to the Southeast on total rates which would preserve the existing relation between the Nashville jobbers, on the one hand, and the jobbers at Atlanta and the other Georgia cities, on the other hand. In the brief for Duncan & Company it is said:

> "The evidence is that six cents per hundred pounds would be a reasonable and profitable water rate from the Ohio River to Nashville. If competition were allowed free play this rate would doubtless be established. This would result in reducing the rates from Ohio River cities to the Southeast. Nashville, affording the lowest combination, would have no need for any concession on the part of the rail carriers in order to enjoy the right of detention and reshipping.
>
> "Nashville would then develop into an important wholesale market. In this consummation Atlanta would rejoice. She would be delighted to have in Nashville a real wholesale market in which her jobbers could make their purchases. Atlanta's point of criticism and complaint is that Nashville is asleep to her own best interests, submits to the arbitrary dictation of the carriers, and seeks compensation by soliciting

the small retail trade in territory naturally belonging to Atlanta and other Georgia cities. Instead of reaching out in fulfillment of her greater opportunities, she appears content to gnaw the bone disdainfully thrown to her by the rail carriers. If Nashville really has a superior situation, because of the Cumberland River, then let her take advantage of that fact, instead of depending upon the grace of the railroads."

In the brief of counsel for the Commission it is said:

"That water competition exists at Nashville is admitted. That it is a concentration point for the products named is not denied. But it cannot be successfully contended that this water competition cannot be met in the same manner that similar competition is met at other points in the country, namely, by reducing the rates to Nashville to meet the water rates. This is the normal way of meeting such competition. The use of the reshipping and rebilling privilege at Nashville for the sole purpose of meeting water competition is in itself a kind of discrimination between the shipments which arrive at Nashville by boats and the shipments which arrive there over the rails of petitioners. As to the former, the railroad says in effect, 'We will carry our traffic at the full outgoing rate from Nashville with no refund.' To shippers who bring their commodities in by rail they say, 'To you we will remit a part of the incoming charge.' While this may have the effect of destroying water competition, it is not an equal treatment as to charges, upon the same commodities, out of Nashville, but gives to a particular class of shippers a rebate. We submit that this is not entirely a fair way of meeting competition. However, this refund has not been condemned as an undue discrimination and was not taken into consideration by the Commission in making its order; it need not therefore be further elaborated here. It is sufficient to say that the maintenance of this reshipping privilege is not necessary to meet water competition. It can be met in the usual way. Nor is the fact that water competition exists the reason, certainly not the sole reason, for the existence of a primary market or concentration point. There are hundreds of such reshipping points throughout the country where no water competition exists."

That counsel, before the case reached this court, should have thus in substance admitted, and emphasized, practically all that is claimed by the Nashville public and carriers, is perhaps due to their confident reliance in the Commission and in the Commerce Court upon the order of the Commission being beyond the scope and power of judicial review.

The Conclusions of the Commission, Stated in Its Supplemental Report, and the Conclusions of the Commerce Court, Stated in Its Opinion.

The Commerce Court held that competition is the ground, and the sole ground on which the reshipping practice can be justified. It held that there is no sufficient justification in the fact that Nashville may be regarded as a natural primary grain market, or that it is a convenient place for drying and otherwise handling grain in transit, or that the practice may result in equalizing Nashville with the river crossings. Stating "the crucial question" to be:

> "Were the L. & N. and the N. C. & St. L. compelled to extend the reshipping privilege to grain dealers at Nashville in order to successfully compete with the transportation of grain, grain products, and hay on the Cumberland River? If they were, then the law of the land declares that the granting of the privilege to Nashville and not to Atlanta, where no such competition existed, would not be a violation of Section III of the Act to Regulate Commerce,"

the Court said:

> "We think that the undisputed facts demonstrate that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River, and on that account alone, and that the undisputed evidence would not support any other finding upon that proposition."

The error of the Commission, as shown by its supplemental report, was in disregarding the undisputed evidence when it held that the admitted dissimilarity of conditions at Nashville is not sufficient "to entitle it to be singled out and exclusively granted the important and extremely valuable privileges denied to its competitors." The view of the Commission was apparently influenced by facts which are either irrelevant, or which actually point to the opposite view being correct. It is irrelevant to the consideration of an important claim of right by the Nashville public and carriers, founded upon the peculiar conditions incident to Nashville's location, to say that reshipping practices are in effect at many other cities where they cannot be justified on any such ground. (It is interesting to note, that when the practice was instituted at Nashville, such a practice was in effect nowhere else, the compulsion which forces it at Nashville being then felt nowhere else. Tr. 261-319.) It is also irrelevant to say that such claims as the one made in behalf of Nashville are frequently made, and found to be untenable. It is also irrelevant, in the absence of any issue of reasonableness, to say that the carriers have met the river competition in such manner as not to reduce the rates on the through business. These and other matters which, as just stated, were recognized by the Commerce Court itself as being insufficient to justify the practice, are stressed in the Commission's report. The Commission also stressed the fact that the practice has proved to be a very effective method of partially meeting the river competition, which was the very purpose for which it was established. The Commission admits the existence of such competition, and apparently admits the necessity imposed on the carriers of meeting it, and it should have approved the reshipping practice as a logical expedient, when it was ascertained not to be inherently unlawful, unless ascertained to be in excess of the right of the carriers to compete. The criticism of the Commission, however, does not seem to be that the carriers have gone beyond the limits of their right to compete, but that the expedient which they have adopted operates "adroitly" to keep clear and distinct the line of cleavage between the local and through business, which, however, is not conceivably a good reason for its condemnation.

ARGUMENT.

It has not been possible to state the case without noticing most of the opposing contentions that were argued before the Commerce Court and will be argued here, and it would be needless repetition to protract this brief much beyond a succinct reference to the principles settled by the decisions of this court, which are believed to be controlling.

But before doing this it is desired to again call attention to the argument of counsel for the Commission that the case falls within the second section of the Act to Regulate Commerce. Without stopping to comment upon the provisions of that section, as construed by this court in Wight vs. United States, 167 U. S. 515, and other cases, the short answer to the argument is that the Commission did not find the reshipping practice to be inherently unlawful, as a device operating to rebate a published rate, which it would be if in violation of the second section, but found it to be inherently lawful, and, in the final paragraph of its supplemental report, expressly based its order upon, and confined it to, the third section of the Act, requiring the inherently lawful practice obtaining at Nashville to be extended to other cities, as an alternative to its abandonment at Nashville.

As has been pointed out, the argument of counsel also includes an objection to the reshipping practice because it is assumed to have had the effect of maintaining unreasonable rates to the Southeast. But there was no such issue presented to or dealt with by the Commission, and no such issue can be taken into view now that the case has passed beyond the Commission.

The single question considered by the Commerce Court, and the single ultimate question to be considered by this court is, whether the Commission was warranted in holding the reshipping practice at Nashville unduly discriminatory, as declared in its order.

The Commission's Order Condemning the Reshipping Practice as Unduly Discriminatory, is Reviewable, and, if Unsupported by Evidence, Is Invalid.

The respondents in the Commerce Court, who are the appellants here, place great reliance on the proposition that the finding of the Commission as to the difference or discrimination, represented by a practice existing at Nashville which does not exist at certain Georgia cities, being undue, is not reviewable.

The proposition is stated in varying terms in the motion of Duncan & Company to dismiss, as for instance, "because, whether a discrimination is unjust is a pure question of fact, the determination of which, with respect to the practices of common carriers engaged in interstate commerce, is by law committed exclusively to the Interstate Commerce Commission, whose opinion with respect thereto, and decision thereof, forecloses judicial investigation." The proposition is also stated in varying terms in the answer of the Interstate Commerce Commission, as for instance "Where an actual discrimination exists between persons, corporations, or localities, whether such discrimination is unjust and unlawful, under the provisions of the act to regulate commerce, is a pure question of fact, the determination of which with respect to the practices of common carriers engaged in interstate commerce, is by law committed exclusively to this respondent, and its conclusions thereon are not subject to judicial review. * * * That in determining that the practice of rebilling and reshipping, as permitted at Nashville, constitutes an unjust discrimination as against Atlanta and the other Georgia cities named in the said supplemental order, the respondent proceeded in the exercise of administrative power, lawfully conferred upon it by the act to regulate commerce, and its action in this regard is not open to review in this honorable court." The answer of the Government, which, *inter alia*, is that "the report made and the order entered by the Interstate Commerce Commission in the premises were and are in the power of that body to make and enter, and the matters and things alleged in the said petition are insufficient to disturb the same," is understood to involve the same proposition, less distinctly stated.

The proposition attributes to the Commission unlimited and arbitrary discretion in the exercise of its most important functions, inasmuch as in the field of transportation innumerable differences or discriminations are created by almost innumerable causes, usually of a competitive character, and questions as to whether they are or are not undue are more frequent and more serious in their bearing upon the business of carriers and the public than any other questions that can arise under the Act.

The contention is not aided by the thought that the Commission can be counted on to move within moderate limits in exercising such a discretion, for important principles of construction and administration are not to be sacrificed in their application to the jurisdiction of a particular tribunal because, for the time being, it is fortunately composed of able and high-minded men, and, as illustrated in the present case, even a Commission thus constituted is, of course, liable to make grave mistakes.

It is understood that this general contention has been disapproved by the decisions of this court, which hold that orders of the Commission are reviewable, whether they have reference to rates and practices that are charged to be unreasonable, or rates and practices that are charged to be unduly discriminatory. In the case of Interstate Commerce Commission vs. Illinois Central Railroad Co., 215 U. S. 452, and in the case of Interstate Commerce Commission vs. D. L. & W. R. Co., 220 U. S. 235, which were decided prior to the decree of the Commerce Court in the present case, orders of the Commission relative to alleged undue discrimination were held reviewable. In the railway fuel coal case, decided a few days before the decree of the Commerce Court was rendered, this court negatived the proposition that the courts are powerless to deal with an order of the Commission condemning a rate or practice as unduly discriminatory, saying:

> "On the other hand, the Commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the Commerce Court or any court. Many of the assignments of error are expressions of this view. * * *
>
> "The facts are certainly undisputed; or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which may be called inferences of fact, yet we think 'power to make the order, and not the mere expediency of having made it, is the question' presented. Interstate Commerce Commission vs. Illinois C. R. Co., 215 U. S. 452." "In other words, that the question presented by the petition is that the order of the Commission was not merely administrative, but proceeded from a construction of Sections 2 and 3 as applicable to the conditions

which affected the traffic in the different kinds of coal, and that the different charges for transportation constituted violations of those sections. The Commerce Court, therefore, had jurisdiction of the petition and jurisdiction to enjoin the order of the Commission if the court considered that the order would cause irreparable injury. Section 3 of the act creating the Commerce Court gives that court the power to 'enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission, in a suit brought in the court against the United States.' Whether the court erred in its judgment is now to be inquired into."

I. C. C. vs. B. & O. R. R. Co., 225 U. S., 326, 339.

With increased emphasis this court, during the present term, in the case involving the rates of the Louisville & Nashville Railroad Company from New Orleans to Mobile and other points (I. C. C. vs. L. & N. R. Co., 227 U. S., decided January 20, 1913), rejected the contention that any order of the Commission made in such a proceeding and after such a full hearing as the Act contemplates, is beyond the power of review. In that case it is in substance declared that the right to a full hearing confers the privilege of introducing testimony, and imposes the duty of deciding in accordance with the facts proved; that a finding without evidence is arbitrary and baseless, and that it would be unconstitutional, as well as irrational, to hold that, where rights depend upon facts the Commission can disregard evidence and capriciously make findings by administrative fiat. It is said that, while courts cannot review the Commission's conclusions of fact "by passing upon the credibility of witnesses or conflicts in the testimony," it is clearly within the scope of judicial power to review any order that is challenged as depriving a carrier of a constitutional or statutory right, or as having been made without an adequate hearing, or as being for any reason contrary to law, and it is pointed out that an order is contrary to law when it is contrary to the "indisputable character of the evidence," or if the facts ascertained do not, as a matter of law, support the order.

In the light of these decisions, any doubt which might have been entertained at the time the pleadings in the present case were filed in the Commerce Court, as to the jurisdiction of that court to review the Commission's order, has disappeared, and the decree of the Commerce Court is without error if, in reviewing the order, it correctly held it to be unsupported by evidence.

The position of the appellees is exactly in line with the decisions cited. They fully realize that an order of the Commission cannot be disturbed because of any error of the Commission in passing upon the credibility of witnesses, or conflict in the testimony. They have not attacked the order of the Commission in this case upon any such ground, but upon the ground, as they believe, and as the Commerce Court found, that it was unsupported by evidence, and inconsistent with the great mass of evidence which is entirely free from any contradiction. That is why they contest an order directed against a rate adjustment which has been in effect nearly half a century, and for nearly thirty years since the passage of the Act to Regulate Commerce, and which cannot be disturbed without putting in peril interests of great magnitude and importance, with serious resulting losses to the public at Nashville and the carriers serving that city.

Discriminations Are Not Undue when Justified by Dissimilarity of Conditions, the Discrimination in the Present Case Being of that Character.

The reshipping practice exists at Nashville, and it does not exist at the Georgia cities, and thus of course there is a discrimination, which is only to say that there is a difference.

Innumerable discriminations or differences are shown by the tariffs on file with the Commission, but the Commission is not authorized, in any instance, to simply look at the tariffs and pronounce a discrimination undue. Before that is possible the issue must be formally presented and fully heard, which contemplates, as this court has said, that the order of the Commission shall be based on the evidence, and is subject to be judicially reviewed, the Commerce Court being substituted for the Commission, except that the court cannot interfere with the conclusions of the Commission in passing upon the credibility of witnesses, or the conflicts of testimony.

The English Traffic Act of 1854 contains a clause closely resembling Section 3 of the Act to Regulate Commerce, providing that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." In an early case, after quoting that provision, and discussing the English decisions, this court said:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. * * * But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute."
>
> I. C. C. vs. B. & O. R. Co., 145 U. S., 263, 283.

As has been shown, there is no denial—it is found by the Commission, as well as by the Commerce

Court, to be the fact—that there is a dissimilarity or inequality of conditions at Nashville, as compared with the Georgia cities, due to the location of Nashville on a navigable river connected with other navigable rivers, and that this has forced the rail carriers at Nashville to engage in competition with the water carriers at Nashville in some fashion, the same necessity not being forced upon them or their connections at any of the Georgia cities, because at those cities such conditions are entirely absent. In many cases, this court has recognized that competition, so controlling as to compel carriers to do what otherwise they would refrain from doing—what they would not in that sense do voluntarily—represents that dissimilarity or inequality of conditions which constitutes a reply to the charge of undue discrimination.

> East Tennessee, V. & G. R. Co. vs. I. C. C., 181 U. S. 1;
> L. & N. R. Co. vs. Behlmer, 175 U. S. 648;
> I. C. C. vs. Alabama Midland Ry. Co., 168 U. S. 144.

In the first mentioned case, which had reference to the disparity between rates to Chattanooga and rates to Nashville, the court said:

> "The prohibition of the Third Section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not re-

> late to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can not be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination." 181 U. S., p. 18.

In the elevator cases the circuit court, by Judge Sanborn, referring to the cases just cited, said:

> "The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation which constitute a controlling factor at Omaha and Kansas City do not exist at St. Louis, and that city is many hundred miles farther distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice."
>
> F. H. Peavey & Co. vs. Union Pacific R. Co., 176 Fed. 409-425.

This court, affirming the decree of the circuit court in that case, among other things, said:

> "The Union Pacific made the allowances in question to elevators at its termini; it had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the Diffenbaugh Case were compelled by competition to make the same allowance at Missouri River points, but they also make it nowhere else."
>
> I. C. C. vs. Diffenbaugh, *et al.*, 222 U. S. 42-48.

The elevator cases are cited now on the point that the presence of competition at one locality, which is absent at another, creates that dissimilarity or inequality of conditions which may justify a discrimination or difference in rates and practices, and also for the purpose of showing that when such dissimilarity or inequality is made manifest, and when, without contradiction, it further appears that the action of the carriers complained of was dictated and compelled by the necessity of meeting the competition, the right claimed by the carriers is not to be whittled away by considerations or inferences not fairly warranted by the evidence. The cases are also cited on the point that the existence of the present situation at Nashville for nearly half a century, during which large investments have been made upon the faith of its maintenance, should not be ignored. The circuit court said:

> "This brief review of the suggestions of counsel in support of the action of the Commission discloses no rebate, no unjust discrimina-

> tion, no undue prejudice—nothing that may bring the sweeping orders before us within the delegated powers of that body. On the other hand, the enforcement of these orders cannot fail to cause great losses and to entail much discrimination. It will strike down the practice of a decade in reliance upon which elevators have been built, terminal grounds in large cities have been bought and equipped, contracts have been made, business and markets have grown up, and business relations have been established."
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> 176 Fed., 425.

This language of Judge Sanborn might be used in describing the situation at Nashville, and what would temporarily result from its disturbance. It recalls the language used by the Commission, with reference to Nashville-Chattanooga rates, after this Court in the case involving those rates, reported in 181 U. S. 1, had ruled upon the matter of water competition at Nashville in its bearing upon its application of the fouth section of the Act. The Commission said:

> "We have no authority, even if we had the disposition, to require an advance of the Nashville rates. Those rates are the product of influences which have long been in potent operation. Theyare rates to which many and important commercial interests are adjusted and on which those interests are largely dependent. The testimony shows that Nashville had lower rates from the East than Chattanooga before the railroads were constructed between Cincin-

> nati and Nashville and between Chattanooga and Nashville, and these lower rates to Nashville have ever since been in force. Their origin and continuance are attributed to the fact that Nashville is much nearer trunk line territory than is Chattanooga, and to the fact of water competition by the Ohio and Cumberland Rivers."
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> Chamber of Commerce of Chattanooga vs. S. R. Co., 10 I. C. C. Rep., 111-133.

Not only have the representatives of the carriers and of the Nashville public united in solemnly telling the Commission of the dissimilar conditions at Nashville, but in declaring that those conditions compel, led the adoption of the reshipping practice against the volition of the carrier; that the same conditions have compelled its maintenance, and that, in honest reliance upon its stability the carriers and large numbers of firms and individuals have made investments which will be placed in more or less peril by the abandonment of the practice. And the witnesses giving this testimony stand uncontradicted.

It is Permissible for the Carriers to Meet the Competition at Nashville by Such a Rate Adjustment as the Reshipping Practice Represents, Instead of by Flat Local Rates into Nashville.

Prior to the Act to Regulate Commerce there was no restraint upon the discretion of a carrier in its selection of the method of meeting competition, and no such restraint is provided by the Act. As to this there is no disagreement.

This court has many times given its approval to the cardinal rule of construction and administration laid down by Mr. Justice Jackson, when the Act had only been in effect for about three years:

> Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."
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> I. C. C. vs. B. & O. R. R. Co., 43 Fed. 37-50.

In a recent case this court quoted the foregoing, and said:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."
>
> I. C. C. vs. C. G. W. Ry. Co., 209 U. S. 108-118.

The Commission has expressed the same view by its present able Chairman:

> "If our railroad systems are to remain in private hands, stimulus must be given to the initiative and imagination of railroad operators,"

and again:

> "This Commission does not sit as a supreme traffic manager for the railroads of the country. Consideration of the policy which they may pursue is not a matter delegated to us so long as it does not infringe upon the prohibitions of the law."
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> Lake Coal Case—I. & S. Docket No. 26, 22 I. C. C. R., 604-612-613.

The carriers are not to be criticized or condemned for adopting the reshipping arrangement as a method of meeting actual and compelling competition, unless it can be demonstrated, as is not possible, that they in some way thereby exceeded their right, whereas they would not have exceeded it by the adoption of flat local rates into Nashville.

The Carriers Cannot be Condemned for Having Met and for Continuing to Meet, in an Effective and Successful Manner, the Actual and Potential Water Competition Which They Encounter at Nashville.

Unless the supplemental report of the Commission is misunderstood, and also the statements that have been quoted from the briefs of counsel for the

Commission and Duncan & Company, the contention is that the rail carriers have "adroitly" met the water competition and subdued a great deal of its activity, without reducing their rates and their revenue to the extent which would be measured by flat local rates into Nashville. It is argued by counsel that they should use the latter expedient, although it might result in wholly eliminating the water carriers and water transportation.

The reply to this is that, so long as carriers respect the prohibitions of the Act, they are at liberty to engage in competition with water carriers in the manner and to the extent they may think proper. They cannot be penalized for destroying their rivals, if it is possible for them to do so, or for falling short of this, and by simply weakening their rivals, appropriating such part of the traffic as the latter may be obliged to surrender. There is another principle, to the benefit of which, carriers meeting water competition, are entitled, namely that they need not, so long as the competition remains potential, discard the rates and practices which were established for the purpose of effectively competing.

As to all of this the courts and the Commission are in general accord.

> "When the rates to Montgomery were higher a few years ago than now, actual, active water line competition by the river came in, and the rates were reduced to the level of the lowest practicable paying water rates and the volume of carriage by the river is now comparatively

small; but the controlling power of that water line remains in full force and must ever remain in force as long as the river remains navigable to its present capacity."

I. C. C. vs. Alabama Midland R. Co., 168 U. S., 144-172.

Citing the last mentioned case, the Commission, by Mr. Commissioner Prouty, has said:

> "It is said that the amount of the movement by water is so insignificant that it should be disregarded. The amount is not insignificant. If reference be had to the traffic which actually originates upon the Atlantic Seaboard a considerable percentage moves by water, but the significant thing is not the amount of the movement, but the ever-present possibility of that movement. (Citing Alabama Midland case.) So here the ocean is ever present. The possibility of using it as an avenue of transportation is ever open, and the fact that it will be used, if for any considerable length of time, the defendants maintain rates which are so high, or so adjusted as to render it profitable for shippers to resort to that means of transportation is never doubtful."

City of Spokane vs. N. P. R. Co., *et al.*, 21 I. C. C. R., 400-418.

And again, by Mr. Commissioner Harlan:

> "Must the rail lines west of Chicago wait until the competition becomes formidable before they can safely adjust their rates to meet it? Must they stand by and permit no reflection of such competition to get into their rates until the

> water lines have become strong enough to carry approximately 'half of the traffic to be served?' We know of no such rule of law, nor does the suggestion appeal to us as logical from any point of view. A railroad cannot be permitted to trifle with the interests of the shippers of one locality by setting up an imaginary water competition as an excuse for making lower rates for another locality that ought on other grounds to be on a parity of rates. But where a well-sustained water competition exists that takes a substantial percentage of the tonnage offered, and could readily prepare to take it all, if left in undisturbed control of the traffic, we know of no reason why the rail line may not meet the competition without subjecting itself to charges of discrimination from other quarters. There is no principle of law that requires it to be content with half the traffic or that forbids it to adjust its rates so as to fight for the whole tonnage the moment it really feels the effect and influence of its competitor's rates."
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> Bulte Milling Co. vs. C. & A. R. R. Co., *et al.*, 15 I. C. C. R., 351-359.

There are, of course, recognized limitations upon the right of carriers to compete, either with water carriers or other rail carriers, and whether the competition be active or potential. The competition must be material and substantial, and not fanciful or merely conjectural (L. & N. R. Co. vs. Behlmer, *supra*), and competitive rates must not be so adjusted as to yield less than the cost of operation (E. T. V. & G. R. Co. vs. I. C. C., *supra*). It is not doubtful from the evidence that these limitations upon their right to compete have been strictly observed by the Nashville carriers in establishing and maintaining the reshipping practice.

The Enforcement of the Commission's Order Would Not Result in the Benefit to the Complaining Interests Which It Contemplates, and This Is One Test of Its Invalidity.

As has been shown, the enforcement of the Commission's order would mean the abandonment of the reshipping practice at Nashville.

It appears from the evidence—from the indisputable character of the evidence, to use the language of this Court—that the abandonment of reshipping at Nashville and the substitution therefor of flat local rates into Nashville, would not in any way benefit the consumers in the Southeast, but, on the contrary, injure them to the extent they might be temporarily deprived of one of the markets of concentration and supply. The markets at the river crossings would still be open to the consumers on precisely the same rates which they now pay, and Nashville would still be open to them, and on the same rates which they now pay, except insofar as the Nashville business might be diverted to the markets at the crossings. The consuming public would not buy either more or less of the commodities because of the reshipping practice being eliminated at Nashville, and the transportation charges applicable to the traffic would not be less than the rates now in effect. The petition which started the proceeding before the Commission was not instigated or filed by the ultimate consumers. In fact, it sharply antagonized the interests of the consumers, in asking the Commission to prescribe a differential between carload and less-than-carload rates, a matter about which the complaining jobbers felt very much more concern than about the practice at Nashville. That matter was deemed by the jobbers of prime importance, and their hope of being able to have a differential prescribed really prompted the proceeding, which was afterwards gradually restricted to the matter of the reshipping practice. In declining to grant the selfish application of the jobbers for a differential, the Commission said:

> "The entire record points to the fact that a differential on this traffic would have the effect of enhancing the price of these products to the consumer. * * *
>
> "The record shows that consumers are now able to buy, and do buy, as cheaply in Nashville and at the river crossings as can the dealers in Atlanta; that the establishment of this differential would concentrate business at southeastern points; and it might reasonably be concluded from this that through the changes which this differential would bring about there would frequently be interposed between the consumer and his supply the profit of one or more middlemen, unless the retailer or consumer continued to buy at the larger markets, in which case he would frequently be compelled to pay the higher rate to be applied under the proposed adjustment on less-than-carload shipments."

It may be fairly stated that in substance the controversy, which is now to be finally determined by this Court, is between the Georgia jobbers, who file the complaint, on the one hand, and on the other hand, the consuming public of the Southeast, the general public at Nashville, and the Nashville carriers.

The evidence is that, should the reshipping practice at Nashville be abandoned, the jobbers of the Southeast would, in buying and selling the commodities in question, still stand in precisely the same relation to the dealers at the river crossings, with respect to rates, which they now occupy, and which is identical with their present relation to the dealers at Nashville. For example, the rates from the river crossings to Atlanta and to Griffin would remain exactly what they are now to those points from the crossings and through Nashville, and the rate from Atlanta to Griffin would be unchanged. The only possible benefit to accrue to the Georgia jobbers would be, as has been shown, consequent on the temporary embarrassment of the Nashville dealers with whom they compete, and who are in closer proximity to the territory of destination than the competitors of the Georgia jobbers who are located at the river crossings. But, as has been shown, any such benefit that might accrue would disappear as soon as the business of carriers and dealers at Nashville had adjusted itself to the new situation, with the result of grain being concentrated there on rates either water or rail, or both, which, in combination with the local outbound rates, would equal, and might even fall below, the through transportation charges that now apply on grain that is brought into Nashville and reshipped.

In view of the evidence which has been summarized, this aspect of the case need not be elaborated. If the premise is indisputable, as it surely is, that the Cumberland River will continue to afford means for the concentration of grain at Nashville, whatever may be the fate of the reshipping practice, and that this factor will serve in the future as it has served in the past, to prevent the Mississippi and Ohio River crossings from obtaining any permanent advantage over Nashville in concentrating and distributing grain in the Southeast, it follows, and this may be taken as one of the tests of the invalidity of the Commission's order, that those who complain of the reshipping practice can gain no lasting benefit from its condemnation and abandonment. Their complaint, as was said by Lord Currichill, in an English case, "may be likened to that of the laborer who, having worked all day, complained that others, who had worked much less, received a penny like himself." (Hozier vs. Caledonian Ry. Co., 1 Nev. & Mac., pp. 27-32.) The same thought is expressed in the decision more than once already referred to, which is of particular importance because it involved a complaint by Chattanooga of rates to Nashville which had been made lower than those to Chattanooga under the same influences that are responsible for the reshipping practice at Nashville, and other similar influences.

"Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short-haul clause had not been brought into play."

* * * * * * * *

"To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

181 U. S., pp. 19 and 20.

The Decree of the Commerce Court is Based upon the Undisputed Evidence, and no Real Doubt as to Its Correctness is Raised by the Reasons Assigned for the Action of the Commission, Whether Stated in Its Report or Subsequently Suggested in Argument. A Recapitulation.

The Court based its decree upon the undisputed evidence, in obedience to the principle which applies in all cases, and which certainly loses none of its force in a case involving commercial and transportation interests that have grown up under an arrangement of long standing.

The Court found, as it was obliged to find, from the undisputed evidence, that there is water competition at Nashville which the rail carriers have been, are, and always will be compelled to meet under penalty of deprivation of business and revenue; that this compulsion has led to the reshipping practice being established and maintained as an alternative to the other method of meeting the competition, namely, by abnormally low local inbound rail rates, and that at none of the Georgia cities is there or has there been like competition, compelling resort to either the reshipping practice or flat local rates in substitution therefor. These being the controlling facts, nakedly stated, the only logical conclusion at which the Commerce Court could arrive is that expressed in its decree.

The Court properly put aside any question as to the meaning of the term "primary market," as unnecessary to be defined, in the light of the conceded fact that the Cumberland River, connecting Nashville directly with the region where grain and hay are produced, renders inevitable the concentration of grain there, and its reshipment therefrom, and it also properly put aside the suggestion that the reshipping practice is a favor given Nashville for the purpose of equalizing Nashville with the river crossings, as being at variance with all of the evidence in the case, historical and otherwise, as well as inconsistent with admissions contained in the reports of the Commission and in the briefs of counsel.

Of course, if the decree is based upon the undisputed evidence, it must stand, whatever the consequences to those who complained before the Commission; and its correctness does not require to be tested by showing that the complainants would not derive the slightest permanent benefit from the abandonment of the reshipping practice at Nashville, although, nevertheless, as above noted, tested in this way, it is manifestly correct.

It will be argued in other briefs filed in behalf of the appellees that, inasmuch as the Nashville carriers do not operate through and beyond any of the Georgia cities mentioned in the Commission's order, it is not legally possible to predicate undue discrimination of the maintenance of the reshipping practice at Nashville, which is an intermediate point upon the lines of each of the Nashville carriers, a position that finds support in the elevator cases, and in the decision in Penn Refining Co. vs. Western New York & Pennsylvania R. Co., 208 U. S., 208-222, cited with approval in those cases. This proposition was not discussed by the Commerce Court, and obviously need not be considered here, if the appellees are justified in assuming that, without regard to whether the liability of the Nashville carriers or of their connections, the lines of none of whom reach Nashville, is joint or several, it is impossible, on the undisputed evidence, to condemn the practice in question as constituting undue discrimination.

Turning from the decree of the Commerce Court to the reports of the Commission and the briefs of Counsel, it is difficult to discover on what ground the Commission based its conclusion, or on what ground the Commerce Court was really expected to sustain the order, except for the supposed reason that it was beyond the power of that court to review.

The Commission itself recognized, as it had already recognized in a former case involving Nashville rates, the very facts just outlined, which form the basis of the decree appealed from. This appears from many statements in the reports of the Commission, and, as illustrating this, attention is again called to the extract from the original report quoted under the fifth subdivision of the foregoing summary of evidence. The Commission seems never to have contested the essential facts on which the Nashville carriers and dealers have always rested their claim. It has not denied the dissimilarity between conditions at Nashville, on the one hand, and the Georgia cities, on the other hand, as claimed by the Nashville carriers and dealers, but has simply, and unfortunately for those interests, remained "not convinced" of the dissimilarity being sufficient to justify the difference.

It appears from the answer of the Commission to the petition, that the Commission, in reaching its conclusion and making its order, did not confine itself to the evidence introduced in the particular proceeding (all of which is certified by the Commission itself as being contained in the transcript of the record in that proceeding, and, thus certified, made part of the record in this case), but went outside and considered facts that had been brought to the knowledge of the Commission in proceedings wholly independent of the one respecting the reshipping practice at Nashville, and otherwise. This admission either itself invalidates the order of the Commission, or it serves to show why the Commission was "not convinced" by what can be regarded as the only evidence which it could legitimately consider.

That Counsel for the Commission and Duncan & Company recognized that the facts are as above outlined, and went even further and recognized that, should the reshipping practice be abandoned there would be concentration at Nashville under very low local inbound rates (which surely, as has been pointed out, would in the end deprive the Georgia jobbers of any transient benefit that might accrue to them from the abandonment of the practice) appears from the extracts from their briefs in the Commerce Court quoted towards the end of the seventh subdivision of the summary of evidence.

Realizing, doubtless, that the Commission's answer that it was "not convinced," could not be deemed sufficient, Counsel in the Commerce Court not only pressed the proposition that the Court was without jurisdiction to review the Commission's order, but, in addition, found it expedient to urge, as grounds for sustaining the order, matters that were never heard of in the Commission proceeding or suggested in either of its reports.

It was urged by Counsel that the case falls within the second section of the Act to Regulate Commerce, which, as has been pointed out, is inconsistent with the theory and the express language of the Commission's decision. It was also urged that the reshipping practice operates to produce unreasonable rates, but, as has been pointed out, no issue of that kind was tendered in the Commission proceeding. It was also urged for the first time in the Commerce Court, having not theretofore been suggested by the Commission or any witness in the Commission proceeding, or any of the Counsel who were connected with that proceeding, that the reshipping practice operates to reduce the sum of the present local rates in, and the local rates out of Nashville, to certain destinations mentioned in the tariffs, more than three cents per hundred pounds, while to nearly all of the destinations the reduction is three cents. But among the conclusive replies to this is that it relates not to the question of undue discrimination, but to the question of the reasonableness of the through rates, which is not in this case; that if it relates to the question of undue discrimination, that is a question of fact and there is no fact to show that the variation in the reduction is a thing that affects any of the complainants who were before the Commission, and further, that the Commission did not and cannot be assumed to have condemned the variation as working the supposed undue discrimination, since, by its order, it authorized the reshipping practice as it now is, to be extended to the Georgia cities, which, if done, would leave the variation unaffected.

It is not believed that any of the contentions noted, which were not made in the Commission, would have been made in the Commerce Court, except that Counsel were hopeless of having the order of the Commission sustained upon a consideration by the Court of the evidence which alone the Commission was entitled to consider.

It is respectfully submitted that there is no error in the decree of the Commerce Court, and that it should be affirmed.

Merrel P. Callaway,
R. Walton Moore,
Solicitors for the Nashville, Chattanooga & St. Louis Railway.

UNITED STATES OF AMERICA *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE COMMERCE COURT.

No. 39. Argued February 24, 25, 1913.—Decided December 7, 1914.

The very purpose for which the Interstate Commerce Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

Where the evidence is undisputed and shows a discrimination between localities, a finding by the Interstate Commerce Commission that such discrimination is undue is a finding of fact which is not subject to review by the Commerce Court.

Quære, and not now decided, whether the method adopted by the Interstate Commerce Commission of considering, and basing its opinion upon, matter gathered in its general investigations regarding the subject-matter in controversy, but not produced upon the particular proceeding against particular carriers in which an order is made requiring them to desist from practices complained of in that proceeding, amounts to a denial of a hearing and results in want of due process of law.

After the amendment to § 4 of the Interstate Commerce Act by the act of June 18, 1910, the authority of the carriers to primarily determine for themselves the propriety of charging a higher rate for a shorter than for a longer distance ceased to exist and was taken from them and primarily vested in the Commission.

In this case the rates and allowances involved and the grain reshipping privilege at Nashville are governed by § 4 of the act. *Intermountain Rate Cases*, 234 U. S. 476.

The application of the principle of public policy embodied in § 4 of the Interstate Commerce Act is to be determined by the substance of things and not by names; otherwise the statute would be wholly inefficacious.

THE facts, which involve the jurisdiction of the Commerce Court to review orders of the Interstate Commerce Commission, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

The finding of the Interstate Commerce Commission that the reshipping privilege constituted an undue preference in favor of Nashville had substantial evidence to support it; is a finding of fact; and is not open to reexamination.

There is substantial evidence to support the finding that the practice unduly prefers Nashville over Atlanta and other Georgia towns.

The Commission's finding that an undue preference exists is a finding of fact, not of law, and therefore is conclusive here. *Balt. & Ohio R. R.* v. *United States*, 215 U. S. 481; *Int. Com. Com.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Com.* v. *D., L. & W. R. R.*, 220 U. S. 235; *Int. Com. Com.* v. *C., R. I. & P. Ry.*, 218 U. S. 88; *Int. Com. Com.* v. *Louis. & Nash. R. R.*, 227 U. S. 88.

The theory of the Commerce Court would practically destroy the Interstate Commerce Commission.

Where the facts are undisputed it is essentially one of the functions of the Interstate Commerce Commission to determine what is the correct order to make, and its conclusion is binding unless based on some mistake of law.

The preference given to Nashville over Atlanta and other Georgia towns cannot be justified by the alleged fact that the reshipping privilege was originally granted to meet water competition or that such water competition still exists.

The evidence is by no means undisputed that the reshipping privilege was originally installed to meet the water competition.

The mere fact that the railroads may have been justified in 1872 in granting Nashville a reshipping privilege is absolutely no evidence that it is now lawful. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *L. & N. R. R.* v. *Mottley*, 219 U. S. 467.

The mere potentiality of water competition does not